



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



11
12
13
14
15

THE

2.44

INSURANCE
LAW JOURNAL.

VOLUME XV.

NEW YORK:-
PUBLISHED BY C. C. HINE,
135 and 137 BROADWAY.
1886

COPYRIGHT, 1886.—C. C. HINE.

THE INSURANCE LAW JOURNAL.

VOL. XV.

JANUARY, 1886.

No. 1

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF OHIO.

JACOB GOOD.

vs.

BUCKEYE MUTUAL FIRE INS. CO.*

A policy of insurance on a building against loss or damage by fire, reserved to the insurer the right to repair or rebuild upon giving notice of such intention within ninety days after proof of loss. After such proof the insurer served notice of its intention to rebuild, "acting jointly with other insurance companies claiming to be interested." At the time of the fire and of this notice, there were ten separate policies, in as many different companies, upon the same building; eight of which served like notices, severally signed by the company serving them. Before the time expired to rebuild, but while the insurers were taking steps for that purpose, the plaintiff compromised and settled with all said companies so electing to rebuild, except

* Opinion filed, October 6, 1885.

defendant, and released each of them from all liability, receiving for such release an amount of money in the aggregate much less than the amount of these policies. The defendant's policy had this condition: "In no case shall the claim be for a greater sum than the actual damages to or cash value of the property at the time of the fire; nor shall the assured be entitled to recover of this company in a greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, whether such other insurance be by specific, or by general, or floating policies, and without reference to the solvency or liability of other insurance."

- Held*, 1. That the liability of the defendant on its policy as a money indemnity for loss or damage by fire was by above-quoted condition in its policy, several and not joint.
2. That the service by defendant of notice of its intention to rebuild, acting jointly with the other companies, having like concurrent insurance, and serving like notices, converted the respective policies from contracts for a money indemnity into contracts of indemnity payable in repairing or rebuilding, to be performed in the time named in the policy, but if no time is specified, then within a reasonable time.
 3. Upon such conversion by the election of the insurers, their liability for failure to rebuild, is several and not joint, unless this several liability was by agreement with plaintiff converted into a joint liability. The service of the notices did not operate to change the terms of this policy. Hence, the plaintiff may recover on this policy such share of the whole damage as the sum insured bears to the whole amount insured without reference to the solvency or liability of other insurance.
 4. That after the policy has been thus converted into a building contract, the insured might settle and compromise with any of the companies thus bound to rebuild, without releasing the others from such proportionate share of such loss as their policies bore to the aggregate insurance.
 5. That in ascertaining defendant's proportionate share of the entire loss reference must be had to the aggregate insurance, without regard to the fact that some of the companies had been settled with for a less sum than they were liable for, or that others did not elect to rebuild, or were insolvent or not liable.

The action below was brought by Good to recover upon a policy of fire insurance of \$1,000, issued by defendant, which it had converted into a building contract by the following clause in its policy:

"For further particulars see application and survey No. 20,451, which is hereby made part of this policy and a warranty on the part of the assured, on file in the office of the Buckeye Mutual Fire Insurance Company.

"Against all such immediate loss or damage sustained by the assured and his legal representatives, as may occur by fire, to the property specified, not exceeding the sum insured, nor the interest of the assured in the property, except as hereinafter provided; from the fifth day of May, eighteen hundred and seventy-eight, at 12 o'clock, noon, to the fifth day of May, eighteen hundred and eighty-three, at 12 o'clock, noon; to be paid ninety days after due notice and satisfactory proof of the same, made by the assured, are received at the office of this company in Shelby, Ohio; it being cov-

enanted as conditions of this contract that this company may repair, restore, or replace the property lost or damaged on giving notice of such intention within ninety days after receipt of proofs herein required, in which case the assured shall furnish plans and specifications of the property so lost or damaged."

The petition avers a total loss by fire on June 18, 1878, due notice thereof, on July 5th thereafter, and notice by the defendant on the 24th of July of its intention to repair and rebuild within a reasonable time, and that plaintiff, as required by the policy, furnished the necessary plans and specifications therefor on the first day of September, 1878, whereby the defendant was bound to rebuild said building and plaintiff was prevented and hindered from rebuilding. Although a reasonable time had elapsed, nothing whatever was done towards performing such contract, and on October 23, 1878, it notified the plaintiff that it did not intend to, and would not rebuild.

On the same day the parties mutually agreed that certain persons named, "should appraise and estimate at the true cash value the damages by fire to said property, which appraisalment and estimate in writing by them, or any two of them, should be binding on both parties so far as regards such appraisalment of loss or damage to said building."

On the 24th of October, these appraisers made their report that such damage amounted to \$32,990, of which defendant had due notice, but has failed to pay the same or any part thereof. Wherefore he prays judgment for \$10,000, with interest from October 24th, 1878.

The answer admits a partial loss, not exceeding \$20,000, of which it had due notice; that it served upon plaintiff, as alleged, notice of its intention to repair, but has not done so by reason of the following state of facts: That at the time the fire occurred, plaintiff had other insurance in nine other companies, aggregating \$32,000, making the total insurance \$33,000; that eight of said companies, including this defendant, having \$29,000 of insurance, gave notice of their intention to repair said building; that two companies which gave no such notice, and which had \$4,000 insurance, did not elect to rebuild; that the several companies representing \$29,000 of insurance, including this defendant, advertised for bids and let the same, and were about to enter into a contract with the successful bidder, when the plaintiff, without the knowledge or consent of the defendant, compromised and settled with said several companies, except the two who had not elected to rebuild, for about \$20,650, and re-

leased said companies from all claims upon them to rebuild and restore said building ; that when this settlement came to the knowledge of defendant, this defendant and plaintiff "waiving all acts done or rights accruing under said notice to rebuild and repair" (except as to defendant's share of expense to plaintiff for preparing plans and specifications for rebuilding amounting to \$37.50, which it has always been ready and willing to pay), the parties entered into an agreement in writing to submit the amount of loss and damage, according to the provisions of said policy to appraisers as stated in the petition.

The reply admits that there was \$33,000 of insurance, but that \$3,000 thereof was in favor of one Hall, a mortgagee, to secure his interest in said property. It admits that the eight companies carrying insurance to the amount of \$29,000 did, on the 24th of July, 1878, give notices, which were several and not joint, of their intention to repair and rebuild, each of which notices was severally signed by the respective companies so electing. He admits settling with all the said companies so electing to rebuild for about \$20,500, which was \$7,500 less than the amount due from said companies. He avers that the defendant had notice of this settlement before, at the time, and after the same was made, and made no objection thereto.

On trial to a jury the issues were found for the defendant, followed by a motion for a new trial, the overruling of the same, prosecution of error to the district court, the reversal of the judgment by that court, the remanding of the case for a new trial, the second trial to a jury, a like verdict, the overruling of a motion for a new trial, with another bill of exceptions, error again to the district court, and a reservation to this court.

The errors assigned are that the court erred in its instructions to the jury in refusing to charge as requested, in overruling the motion for a new trial, and in giving judgment against the plaintiff. On the trial the plaintiff admitted that he had \$29,000 of concurrent insurance in the several companies electing to rebuild, and \$4,000 not included in said \$29,000 ; that each of said companies so electing, served upon him a notice of which the following is a copy :—

AKRON, O., July 24, 1878.

JACOB GOOD, Esq.:—

DEAR SIR : This company is in receipt of papers purporting to be proofs of loss under policy No. 20,451, issued by this company and held by you. Your attention is respectfully directed to the general conditions of said pol-

icy, and you are hereby notified that it is the intention of this company, acting jointly with other insurance companies claimed to be interested, to repair and rebuild the premises claimed to have been damaged, with other of like kind and quality within a reasonable time, and you are hereby required to furnish plans and specifications of the building destroyed. Any communication you may have to make in reference to the matter please direct to the office of this company, Shelby, Ohio.

Respectfully.

Each of said notices being signed by the company giving it. That on the 12th day of October, 1878, plaintiff settled with each of said companies so electing to rebuild, except this defendant, carrying \$28,000, and received from them \$20,500 and released each one of them from all claim which he may have had upon their respective policies or arising under said contract to rebuild or repair.

The evidence of witnesses in the case relates chiefly to the loss or damage. It appears that after the settlement and compromise with the seven companies which, with the plaintiff, had elected to rebuild, the parties to this action attempted to compromise. Upon this point, Foust, the general agent of the company, testifies as follows: "On the 19th day of October, 1878, S. S. Bloom, president of the company, received a letter from J. J. Hall requesting the company to settle the loss; Bloom answered that I would be there Tuesday or Wednesday following; Tuesday, October 22, 1878, at 5 o'clock p. m., I arrived at Akron for the purpose of settling Good's loss; soon after coming there I went from the Sumner House to Good's building, where the fire occurred; I saw that they had already commenced preparatory work for rebuilding the same; Wednesday, October 23, 1878, p. m., I met Messrs. Upson and Hall, attorneys for Good, in Hall's office; they claimed one thousand dollars and damages of the Buckeye; I refused to settle in this way, and made them two propositions; first, to compromise on same basis as other companies; or, second, to have an appraisalment by two or three disinterested, competent persons; they said they would consult with Good. October 23, in the evening, I met J. J. Hall and Jacob Good, in the office of the former, and we then entered into an agreement in writing; the following persons were selected as appraisers: Frank Lukesh, D. W. Thomas, and William H. Smith, 'architects,' who were to appraise the damage by fire to the property insured under the policy; before Good consented to sign said agreement he wanted me to pay our share of damages for not rebuilding; this I had first refused to do; we finally agreed that

the company would pay the sum of \$37.50 as its proportion of the cost of the plans and specifications ; Good then signed the agreement to leave it to appraisers. At Shelby, Ohio, Tuesday, October 29, 1878, report of appraisers on the Good loss came to hand from Akron ; the appraisalment was not satisfactory to me for several reasons, one of which was, they counted in plate glass, not covered by our policy, and on which I understood Good had separate insurance ; I ordered the secretary to say to Good that we would pay him (\$834.83) eight hundred and thirty-four and 83-100 dollars, including thirty-seven and 50-100 dollars, the amount of damages for not rebuilding, as agreed upon ; also, discount for ninety days at ten per cent per annum ; Good refused to accept the draft. (Above answer objected to by plaintiff's attorney.)

"Q. Before going to Akron, as stated above, on the twenty-second day of October, had you learned that Good had settled with the other companies ; and did you also learn this fact after reaching there, from them ?

"A. I learned it before I left Shelby, and I talked it over with Good and his attorneys after reaching Akron."

The agreement for submission to arbitrators mentioned in the pleadings, and referred to in Foust's testimony, is as follows :—

AGREEMENT FOR SUBMISSION TO APPRAISERS.

It is hereby agreed by Jacob Good, of the first part, and the Buckeye Mutual Fire Insurance Company, of Shelby, Ohio, of the second part, that David W. Thomas, William H. Smith, and Frank Lukesh, of Akron, Ohio, shall appraise and estimate, at the true cash value, the damage by fire to the property belonging to Jacob Good, as specified below, which appraisalment and estimate by them or any two of them, in writing, as to the amount of such loss or damage, as per the accompanying schedule, shall be binding on both parties, so far as regards such appraisalment ; it being understood that this appointment is without reference to any other question or matters of difference within the terms and conditions of the insurance, and is of binding effect only so far as regards the actual cash value of, or damage to such property as may be found to have been saved in a damaged condition which was insured and covered by policy No. 20,451 of said company, issued at the Akron agency.

The property on which damage is to be estimated and appraised is the three-story brick and stone mansard and tin roof building, situate on the north side of East Market Street, between Main and High Streets, Akron, Summit County, Ohio.

And it is expressly understood and agreed, that said appraisers are to take into consideration the age, condition, and location of said premises previous to the fire ; and also the value of the walls, materials, or any portion of said building saved, and after making an estimate of the cost of replacing said

building, a proper deduction shall be made by them for the difference (if any) between the value of a new or replaced building and the one insured; and in case the company shall be unable to re-instate or repair the building, because of any provision of law to the contrary, it shall be liable to pay only such sum as would be required to re-instate or repair the building, if the same could be lawfully rebuilt or repaired; and it is furthermore expressly understood and agreed that in estimating the damage to stock, machinery, or other property, the said appraisers are to take into consideration the age, condition, and location of said property previous to the fire, and also the cash value of said property or any portion thereof which may have been saved in a damaged condition, and after making an estimate of the cash cost of replacing said property, a proper deduction shall be made by them for the difference (if any) between the value of the said property replaced new, and the said property insured. Said appraisers are hereby directed to exclude from the amount of damage any sum for previous depreciation from age, location, ordinary use, or cause whatever, and simply to arrive at the damage actually caused by said fire.

Witness our hands at Akron, Ohio, this 23d day of October, 1878.

JACOB GOOD.

D. I. FOUST, *for company.*

J. J. Hall, one of the attorneys for plaintiff, testifies as follows, touching the negotiations for a compromise, and the circumstances under which the agreement to arbitrate was signed:—

“Q. You may state to the jury whether, as attorney for Good, you were present at the meeting with Good in your office.

“A. I was present.

“Q. Who was present beside yourself?

“A. Good, Foust, and I think Mr. Motz.

“Q. State to the jury the conversation that occurred at that time.

“A. Foust, I think, had been to see Good before this. When Good came to the office Foust was in there. Foust said, ‘I came to see about that loss to see if it could be arranged.’ It is impossible for me to give you all the conversation. He said to me he was very much dissatisfied with Mr. Pattison, because he had not settled as we wanted him to. I said, ‘Mr. Foust, we have no claim against you on the policy. Our claim is against you for not rebuilding the building, after you served the notice upon us to rebuild.’ He then said: ‘We cannot put up that building.’ We had considerable conversation about it. Then he said, ‘We will not put up the building, but we will pay what these three men determine the damage is; whatever they find it to be we will pay.’ I said, ‘There will be additional expense making out these plans and specifications.’ He said, ‘We will pay our share of that, too.’ I am very certain that there was not one word said about \$37.50. They agreed to pay whatever

these three men agreed the damage was ; if it was \$10,000 they would pay it ; if it was \$40,000 they would pay it. It was understood between us that this was to be the amount they were to pay.

"Q. You may state if anything was said with reference to waiving the contract to rebuild.

"A. Nothing was said ; nothing of that kind was thought ; if they paid us the amount these men would find we would be satisfied.

"Q. At any time, so far as you know, was there any negotiation about waiving the contract to rebuild ?

"A. None, whatever."

Good, the plaintiff, on the same subject, testifies:—

"Q. Were you present at the time referred to by Mr. Hall, when this agreement was signed ?

"A. Yes, sir.

"Q. You may state whether you talked the matter over with them, or Mr. Hall for you.

"A. Mr. Hall did most all of the talking.

"Q. You may state whether at that time, or any other, you have made any agreement with this company, or any of its agents, with regard to waiving the contract to rebuild ?

"A. No, sir."

On cross-examination said witness further testified:—

"Q. Mr. Hall did the talking, did he ?

"A. Yes, sir.

"Q. When he told you to sign that paper, you signed it ?

"A. Yes, sir."

Henry Motz, who was present with Foust in the office of Hall when this arbitration agreement was signed, and who was at the time an agent of the defendant, gave the following testimony upon this point:—

"Q. Do you recollect of going with Mr. Foust after the fire, and after the settlement with the other companies, to Mr. Hall's office ?

"A. Yes, sir.

"Q. Who was present ?

"A. Mr. Hall, Mr. Good, Mr. Foust, and myself.

"Q. What was done and said by Mr. Foust to Mr. Hall and Good as to the notice they had given plaintiff as to rebuilding ?

"A. Mr. Foust, of course, came over here to pay his loss on the building.

"Q. What occurred there in regard to that question, as to the agreement to rebuild ?

"A. When they came together to make the agreement, Mr. Good said that he had additional expenses to get up the plans and specifications; Mr. Foust said that he would pay his share of the additional expense; we then agreed to have these appraisers estimate the loss and damage to the building by the fire, which amount we agreed to pay.

"Q. Did they agree what the Buckeye Insurance Company's expenses should be for the plans and specifications ?

"A. The full amount was \$37.50.

"Q. After that agreement, did they agree upon the appraisers ?

"A. Yes, sir.

"Q. Do you know who the appraisers were ?

"A. Yes, sir; D. W. Thomas, Frank Lukesh, and W. H. Smith."

On cross-examination said witness further testified :—

"Q. At what time was that conversation had ?

"A. In Mr. Hall's office, the same fall after the fire.

"Q. At what date ?

"A. I think it was the latter part of October; it was the same day this agreement was signed for the appraisers.

"Q. Who did you say were present ?

"A. Mr. Hall, Mr. Foust, Mr. Good, and myself."

That part of the charge of the court to which plaintiff excepted, will be found stated in the opinion.

So much of the policy as bears upon the questions involved, is as follows :—

"In case of loss, the assured shall give immediate notice thereof, and shall render to the company a particular account of said loss, under oath, stating the time, origin, and circumstances of the fire, the occupancy of the building insured or containing the property insured, other insurance, if any, and copies of all policies, the whole value and ownership of the property, and the amount of loss or damage, and shall produce the certificate, under seal of a magistrate, notary public, or commissioner of deeds nearest the place of the fire, and not concerned in the loss or related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property

insured to the amount claimed by the said assured. In no case shall the claim be for a greater sum than the actual damage to or cash value of the property at the time of the fire ; nor shall the assured be entitled to recover of this company any greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, whether such other insurance be by specific, or by general or floating policies, and without reference to the solvency or the liability of other insurance." Also, "Damage to property not totally destroyed, unless the amount of said damage is agreed upon between the assured and the company, shall be appraised by disinterested and competent persons, mutually agreed upon by the parties."

J. J. HALL and W. H. UPSON, *for Plaintiff.*

S. S. BLOOM and A. T. BREWER, *for Defendant.*

JOHNSON, J.

Two questions are presented as grounds for reversal of this judgment ; first, as to the construction by the court below of the agreement to appraise the damages made on the 23d of October, 1878 ; and, second, as to so much of the charge of the court relating to the effect of the several notices given by the eight different companies, to restore the building, and the effect of the compromise with seven of the companies electing to rebuild upon the plaintiff's right to recover.

I. As to the effect of the agreement to arbitrate the value of the loss or damage sustained by the fire. Upon this point the charge is as follows :—

"In this connection I will say to you that, under the provisions of the policy, it was optional with the insurance company to indemnify the plaintiff for his loss, either in money or by rebuilding the building.

"If this agreement had been entered into prior to the notice to rebuild, I should say to you that it related to any subsequent acts of the parties, and that is so because its provisions relate to both modes of indemnifying the loss

"But having been entered into after serving the notice to rebuild, it must be considered as having reference to that provision of the policy relating to paying money as indemnity for paying the loss, and as waiving the contract to rebuild. Such portion of it as relates to other acts of the parties must be considered as irrelevant in

the construction of the contract. The proper construction to be given to this agreement is, that it relates to the question of the loss under the policy originally and the payment of that loss in money. This is the view in which I feel compelled to require you to consider this agreement." To which charge, commencing with the word, "But," at the beginning of the last paragraph, the plaintiff then and there excepted.

II. As to the effect of the notices to rebuild, the duties and obligations created by the parties, and also the effect of the settlement with seven of the eight companies upon the right of plaintiff to maintain an action against the eighth, the charge is as follows:—

"Under the policy the defendant had the right to indemnify the plaintiff by paying in money the damages by reason of the fire, to the extent of the amount of its policy, or, by electing to rebuild and repair the building, in which latter case it must give notice of its intention to repair and rebuild, in which event, on giving such notice the relation of the parties changed, and it becomes the privilege and duty of the company to reconstruct the building, substantially in the same condition as it was when destroyed, and this without reference to the amount of the policy, and the measure of damages for the breach of such a contract would be the cost of restoring the building to its former value and condition.

"If there was but one policy, and consequently but one notice to rebuild, there would be but little difficulty in determining the rights and liabilities of the company; but in this case there were several companies which gave notice of their intention to repair, and those notices were not independent of one another, but were all to the effect that the companies, acting jointly with the others, intended to repair and rebuild the building. This defendant gave no notice of its intention, alone and independent of the other companies, to rebuild. It did not say, with its \$1,000 policy, it alone would restore the building that would cost more than \$30,000, and upon which there was other insurance to an amount of some \$30,000 or more, without the assistance of such other companies. But its notice was that it is the intention of this company, acting jointly with other insurance companies claimed to be interested, to repair and rebuild the premises. Its undertaking was to rebuild jointly with the other companies representing \$28,000 of insurance on the damaged building, which companies had served like notices.

"There being no objection to the form or substance of those notices,

the plaintiff must be held to have accepted them with all the obligations they imposed upon him, and all the rights they gave the defendant, and duties they imposed upon it and the other companies acting jointly with the defendant. Among these were the duty and liability of each and all of these companies to aid in and contribute to the repairing of this building, and in the event that the defendant should be compelled to rebuild alone, it could compel contributions proportionately from all the other companies joining in the enterprise.

"It imposed upon the plaintiff the duty of not interfering with these obligations and rights of the defendant, and thereby preventing it from performing its obligations to him. He was not authorized to settle with the other companies, and take from them the money which they had pledged. Both the [money of] defendant and plaintiff should be used jointly with that of the defendant in repairing the building, and to keep the money without offering it to the defendant, as the companies were bound to do in furtherance of the common object, and in doing which to prevent the defendant from the right of enforcing contribution from such other companies. It was his duty to permit the defendant to repair the building pursuant to its notice, and not by his act to put it beyond its power to do so. The defendant claims he did this; the plaintiff denies it."

To which charge, commencing with the words, "If there was but one policy," etc., the plaintiff then and there excepted.

The court, by request of defendant, further charged the jury on the same point as follows :—

"The plaintiff in this action, not claiming the right to recover upon the policy, but solely upon the notice of the intention of the defendant to rebuild and for damages resulting from defendant's failure to rebuild under and pursuant to its notice, I say to you, if you find from the evidence the fact to be that other companies, having concurrent insurance with the defendant upon said building to the amount of twenty-eight thousand dollars, served upon the plaintiff notices the same as served by the defendant of their intention, acting jointly with this defendant and other insurance companies having such insurance on said building, to repair and rebuild the same, and that after such notices were so served, the plaintiff settled with those other companies and released them from all claim he had upon them or either of them, and also from all right to any claim he had upon them or either of them, and also from all right to any claim under said notice to rebuild, and retain the money thus received, without

offering to aid the defendant with the same to the extent that such companies were bound to aid it in rebuilding; then I say to you, the plaintiff forfeited his right to require the defendant to rebuild under its notice, and he cannot maintain this action, and your verdict should be for the defendant." To which charge as so given the plaintiff excepted.

The court, by request of the defendant, further charged the jury as follows :—

"If you find from the evidence the facts to be that other insurance companies than the defendant had, with the defendant concurrent insurance on said building to the amount of twenty-eight thousand dollars, and the said companies served upon the plaintiff like notices of that served by the defendant, of their intention, acting jointly with the defendant and the other companies, [that] they intended to rebuild and repair said building, and that after such notices were served, the plaintiff settled with all of said companies, except the defendant, and released said companies and each of them from all obligation or claim of the plaintiff upon them, or either of them, to repair or rebuild said building by reason of said notices or otherwise, and this defendant, after such settlement and release, notified the plaintiff that it could not and would not alone rebuild because of such settlement and release by him, and he then proceeded to repair and rebuild it himself, and then entered into an agreement in pursuance of the conditions of said policy, to have an appraisement of the damages to said building by reason of the fire, and said appraisement in pursuance of said policy and agreement was had, I say to you that such facts would constitute a waiver of any claim against the defendant for not repairing or rebuilding said building, and he could not sustain this action, and your verdict should be for the defendant." To which charge the plaintiff then and there excepted.

The plaintiff requested the following charge touching the agreement submitting the loss and damage to appraisers :—

"That in determining whether the plaintiff waived his claim under the agreement to rebuild, the jury may consider any testimony that has been given to them tending to show that the plaintiff, on signing the agreement which has been offered in evidence appointing David W. Thomas, William H. Smith, and Frank Lukesh as appraisers, understood it to be an agreement submitting to said appraisers to determine the amount of damages to be paid by the defendant to the plaintiff on account of the defendant's failure to comply

with its agreement to rebuild." Which request the court refused to give, to which refusal to so charge the jury, as requested, the said plaintiff then and there excepted.

As the conclusion we have reached upon the second point above stated will aid in determining the first, we will consider these questions in the reverse order of their statement. Upon this point the charge of the court was, in substance, that the several notices to rebuild, though severally signed by the respective companies, yet the contract to rebuild was a joint contract with respect to the rights of the plaintiff, and that the settlement by plaintiff with seven of the eight companies so electing to rebuild, and releasing them from all liability, defeated plaintiff's right to action against the other electing companies. Independent of statute, and of the provisions contained in this policy, this result, upon common-law principles, would follow, but in determining whether this election by defendant to rebuild, acting jointly with the other companies, created a joint obligation as respects the plaintiff's rights, reference must be had to the terms of the policy itself. This policy was but one of several covering the same property. It contemplated other insurance. It stipulated that in case of such insurance the assured should not "be entitled to recover of this company any greater portion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property * * * without reference to the solvency or liability of other insurance." This stipulation is one in favor of the insurer and makes its liability several and not joint. It gave to the plaintiff in case of loss or damage a right of action against this company for its proportionate share of the damages sustained for not rebuilding, pro rated with reference to the amount of concurrent insurance.

The words of the condition are: "In no case," can the insured recovered more than said pro-rata share. There is another limitation to the amount of recovery—the assured cannot recover beyond his actual loss. After the insurer has elected to rebuild and has entered upon the performance of his contract, the contract of indemnity may be discharged by rebuilding. If there is a failure to rebuild, the insurer becomes liable for the damages sustained by the plaintiff for such failure. Whether the plaintiff, in case of such failure, is restricted to his action for damages for such failure or may elect to treat this election to rebuild as abandoned and may sue upon the the policy as an indemnity contract payable in money, that is, whether the right to treat it as a money indemnity the same as if no

election had been made to rebuild, was merely suspended until such failure, as is held in some States, or became extinguished, leaving a right of action on the building contract as plaintiff's sole remedy, we need not now determine. As a contract of indemnity, payable in money, it was clearly several in its nature, though there was concurrent insurance. We think that the same provisions of the policy which require several actions thereon to recover a money indemnity, are equally applicable to the the liability of this company for damages for failure to rebuild. Each company would in such case be severally liable for its pro-rata share of the loss and damage, not exceeding the interests of the assured in the property. In case of concurrent insurance and no election to rebuild the action must be against each for its pro-rata share of the loss, not exceeding plaintiff's loss. If any of the companies are insolvent this loss must fall on the insured. Defendant did not undertake to share any loss to the plaintiff, whether arising from insolvency or non-liability of other insurance, or by compromise on other policies.

Plaintiff could insure in as many companies as he chose. By the terms of this policy he could only recover defendant's pro-rata share.

This is equally true whether in an action for failure to rebuild, or is to recover indemnity in money. If the action is for not rebuilding, the damages may exceed those if the suit is for money where there is no election.

Where the aggregate loss exceeds the insurance and the insurer elects to rebuild, the damages, unless limited by the terms of the policy, must equal the cost of restoring the building.

In case of concurrent insurance, and some of the companies elect to rebuild, and others do not, and there is no pro-rating clause, there is a separate cause of action against each for failure to rebuild, where there is no subsequent agreement converting the policies in a joint contract. The giving of these notices was the sole act of the insurers. Plaintiff had no option. This did not operate to convert a several into a joint obligation—as against plaintiff, whatever its effect as between the insurers themselves. If there was no pro-rating clause, such as is found in this policy, and no limitation on the amount of liability to rebuild, each of several companies electing to rebuild, would be liable to rebuild, and several actions for a failure could be maintained, but there could be but one satisfaction for the amount of actual loss.

Where several elect to rebuild and one only does so, the plaintiff's claim is satisfied as to all, and the one so performing is left to his

right of contribution, whatever that may be, against the other electing or non-electing.

Under this policy, the election to rebuild did not defeat plaintiff's right to recover of those not electing, when the building contract was not performed.

If those non-electing, paid in money, before the building was replaced to plaintiff, it would diminish the amount of recovery for a failure to rebuild, as plaintiff's right extends only to an indemnity for his actual loss. If paid after the building was replaced as before the fire, it in equity belongs to those rebuilding.

In the policy before us the liability of defendant is expressly limited to its pro-rata share of the amount lost. Hence plaintiff's recovery of other companies by compromise, or otherwise, does not affect the amount to be collected of defendant. And where one of the several policies is for the benefit of a mortgagee of the insured property, upon a mortgage made by the insurer, this is other insurance to be taken into the account, in ascertaining defendant's pro-rata share of the loss. Payment to the mortgagee is payment pro tanto of plaintiff's loss.

In the case at bar, eight of the ten companies having concurrent insurance, elected to rebuild. This did not defeat the right of plaintiff to recover of those not electing, upon their respective policies for the amounts for which they were liable, but as the insured can have but one satisfaction for his actual loss, and as there is a separate contract with this defendant limiting his liability to his pro-rata share, without regard to the solvency or liability of any other insurer, this defendant is liable only to pro-rata with other insurers for damages resulting from a failure to rebuild. To illustrate: The damages as found by the appraisers was \$32,990, the aggregate insurance was \$33,000, and the defendant's policy was \$1,000. Pro-rating this loss according to the terms of the policy defendant would be liable for \$999.69. The option to rebuild was a mode of payment of the damages covered by the policy reserved for the benefit of the insurer, and damages for failure to rebuild is as much indemnity, payable in another form, for the loss covered by the policy as if the same was payable in money, where no election had been made. The terms of the policy are explicit: "In no case shall the claim be for a greater sum than the actual damages * * * nor shall the assured be entitled to recover of this company any greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property." This

clause follows that which gives the election to rebuild, and in express terms applies to claims for damages arising from a failure to rebuild. It follows therefore that while these notices to rebuild served by the respective companies on the 24th of July, 1878, may, as between such companies, create a joint obligation, yet, as to this plaintiff, his right of action and the amount of his recovery for failure to rebuild is several against the several companies who were liable in damages, and the amount of his recovery is to be pro-rated in each case accordingly, as provided in the policy. In such pro-rating the aggregate insurance including the two companies not electing to rebuild, is to be taken into the account in ascertaining defendant's proportion of such loss. If we assume, however, that the court below was correct in charging that this was a joint building contract, still there was error in charging that the settlement made by the plaintiff with seven of the joint contractors discharged the other. This was so at common law, but is not so under our statute. (Revised Statutes, sec. 3,162 to 3,166.) These sections authorize a composition or compromise with one or more joint debtors, without discharging the others, and without impairing the right of action against such others. In such case the settlement of the joint debtor is equivalent to a payment of his proportionate share of the debt. It leaves the right of action against the other debtor intact for its proportionate liability in the obligation.

II. As to the effect of the agreement to arbitrate the damages. This agreement was entered into on the 23d of October, 1878. The plaintiff had compromised with seven of the eight companies after they had converted their policies into building contracts. The testimony shows that Foust, the agent of the company, then visited Akron for the purpose of settling the controversy between plaintiff and defendant. He had heard of this release of the other seven companies before he left home, and had been notified to fulfill his contract. He went for the purpose of adjusting his company's liability. He then did not claim that defendant was discharged from all liability by reason of the release of the other seven companies. The plaintiff had already resumed possession and had made some preparations to rebuild. He (Foust) made two propositions for a settlement; first, to compromise on the same basis as plaintiff had compromised with the other seven companies; or, second, to have appraisers to assess the actual loss occasioned by the fire. The parties being unable to agree to the first, this agreement of submis-

sion to appraisers was entered into. The court charged the jury that this of itself was a waiver of all right to recover in an action for damages for failure to rebuild ; that as matter of law it related solely to an adjustment of the loss under the policy, and did not relate to a loss for failure to rebuild. In this, we think, the court erred. Before entering into this agreement the company was distinctly informed that the plaintiff was not claiming under the policy for money indemnity, but for not rebuilding. Under these circumstances the parties agreed to submit to appraisers the sole question of the actual cash value of, or damage to such property, and the award of the appraisers was to be binding on both parties so far as regards such appraisement, the other matters of difference between the parties within the terms and conditions of the insurance being left for adjustment by the parties. In view of the matters in difference at the time of the plaintiff's claiming his right to damages for failure to rebuild, the defendant offering to compromise and not denying his liability in some amount, this agreement may be regarded as referable to the controversy between the parties, namely—the amount which defendant should pay, whether based upon the contract to rebuild or on the policy as an indemnity. There is nothing in the agreement showing the intention of the parties to limit such appraisement to a claim upon the policy as a contract of indemnity. They were to ascertain the amount of loss or damage to the property. This mode of ascertaining the loss and damage is expressly provided for in the policy, and independent of this provision of the policy it was competent for the parties to refer this question to arbitrators and make their award binding. As we have adjudged that at the time this agreement was entered into, there was an existing liability of defendant in damages for failure to rebuild proportionate to its pro rata share of insurance, the appraisement made under the agreement would become a material factor in determining its share of such damage. That amount known, the amount of defendant's liability would become a mere matter of calculation. The plaintiff by entering into this agreement cannot, as a matter of law, therefore, be said to have waived an existing right of action. The agreement had the same force and effect as a method of adjusting the loss and of settling that question, whether his suit was on the policy or upon the contract to rebuild. The facts and circumstances clearly show that it was not the intention of plaintiff to waive or abandon his right under the policy as a contract to rebuild. He was simply agreeing to a mode of assessing

the loss or damage by fire, which when settled would be binding on both parties unless set aside, leaving all other questions to be determined by the parties themselves or by litigation.

The amount of damages when ascertained, by whatever mode, was a necessary factor in arriving at the pro-rata share of defendant's liability, whether the action was upon the contract regarded as an indemnity payable in money or as a rebuilding contract. It was error, therefore, in the court to leave out of view the circumstances under which this agreement for an appraisal of damages was made, and to charge that it was solely referable to the contract of insurance, payable in money, and was therefore a waiver of an existing claim or demand for damages for failure to rebuild.

Judgment reversed.

SUPREME COURT OF PENNSYLVANIA.

Error of the Court of Common Pleas No. 1 of Allegheny County.

SCOTT

vs.

DICKSON.*

A person who is a surety on another's bond has an insurable interest in the latter's life, and such an insurance would not be a wagering contract.

When A had his life insured and told the company he wished the insurance to be for B's benefit, and the company told A to take the policy out in his, A's, name, and then make an assignment to B, the company will be estopped from claiming that the assignment was not good because it had been left in their hands, and A had continued to pay the premiums until his death.

And now, April 2d, 1884, the following case stated for the opinion of the court in the nature of a special verdict :—

Archibald Dickson, bachelor, late of the city of Pittsburgh, died, November 1st, 1883, intestate (so far as yet appears), leaving two brothers and two sisters, and letters of administration upon his estate were duly granted to one of said brothers, the plaintiff.

On December 30th, 1882, Archibald Dickson made an application to the Mutual Life Insurance Co. of New York, through William P. Wooldridge, the Pittsburgh agent of said company, for a policy of insurance upon his life, and a few days later said company issued its policy of insurance, No. 236,992, dated the date of the application aforesaid, and forwarded the same to said Wooldridge for delivery.

A copy of said policy, so far as material to this case, is hereto

Decision rendered, January 5, 1885.—From *Legal Intelligencer*.

attached, marked Exhibit A, and made part hereof. On January 4th, 1883, Archibald Dickson went to the office of said Wooldridge to lift the policy, and upon its being produced, said to Wooldridge that he wanted to transfer it to John F. Scott, "the best friend I have in the world." Wooldridge called the attention of Archibald Dickson to the company's requirement in case of transfer, as printed upon the policy, and then procured two of the blank forms for assignments used by said company, both of which were then filled up and signed by Archibald Dickson. A copy thereof is hereto attached, marked Exhibit B, and made part hereof. One of the two papers so executed was delivered to Wooldridge, who forwarded it to the general office of the company, where the same was duly received and noted. The other of the two papers so executed, with the policy, remained in the possession of Archibald Dickson until his death. Archibald Dickson himself paid all the premiums upon said policy, notice of maturity of the same as they fell due being sent to him pursuant to his request, made to said Wooldridge at the interview above mentioned. He never told John F. Scott that he had procured or transferred such policy, and the first actual knowledge said Scott had of the existence of the policy or its transfer to himself was after the death of Archibald Dickson.

John F. Scott was not in any manner related to Archibald Dickson by blood or marriage, nor was he at any time a creditor of Archibald Dickson. Said Scott had been for some years a surety upon Dickson's official bond, but the latter had to the time of his death, faithfully fulfilled the condition of said bond, and neither principal nor sureties were liable thereon.

The said insurance company has paid the sum of \$4,011 on proof of loss furnished by defendant at an expense of fifty dollars, and the said parties, plaintiff and defendant, having united in a receipt to said company (made necessary by notice from plaintiff not to pay defendant), have placed the said sum of \$4,011 in the hands of William Scott, to be paid, less the cost of proofs of death, to the person entitled thereto, in accordance with the final judgment in this case, but as between said plaintiff and defendant, for the purpose of the questions hereby raised, the same is to be regarded as in the hands of the defendant.

If the court shall be of opinion that the plaintiff is entitled to recover from the defendant the amount paid by said company (less the amount of expenses as aforesaid) upon said policy, then judgment to be entered for plaintiff, and against the defendant, for one

dollar ; but if the court shall be of opinion that the plaintiff is not entitled to recover as aforesaid, then judgment to be entered for defendant ; the costs to follow the judgment, and either party to have the right to sue out a writ of error herein.

Exhibit A.

No. 236,992.

The Mutual Life Insurance Company of New York.

Semi-endowment.

Amount, \$2,000 End.

Age 32 years.

\$4,000 Life.

One-half annual premium, \$57.76.

In consideration of the application for this policy, and of the truth of the several statements made therein, and of the premiums hereinafter specified, promises to pay at its home office, in the City of New York, unto Archibald Dickson, of Pittsburgh, in the County of Allegheny, State of Pennsylvania, or his assigns, two thousand dollars, on the thirtieth day of December, in the year 1902, if then living, at its said office of the company, in the City of New York, or if he should die before that time, then in like manner to pay the sum of four thousand dollars to his executors, administrators, or assigns (any indebtedness to the company on account of this contract to be first deducted therefrom), within sixty days after satisfactory proof at its said office of the death of the said Archibald Dickson, during the continuance of this policy, upon the following conditions: * * * * *

In witness whereof, the said, The Mutual Life Insurance Company of New York has caused this policy to be signed by its President and Secretary, at its office in the City of New York, the thirtieth day of December, A. D., 1892.

ROBERT A. GRANNIS,
Vice-President.

ISAAC F. LLOYD, Secretary.

(Upon back of policy.)

Provisions and requirements referred to in this policy. * * * * *

Notice.

Assignments. — The company declines to notice any assignment of this policy until the original or a duplicate or certified copy thereof shall be filed in the Company's Home Office. The company will not assume any responsibility for the validity of an assignment.

Exhibit B.

Form of Assignment.

For one dollar, to me in hand paid, and for other valuable considerations (the receipt of which is hereby acknowledged), I hereby assign, transfer, and set over to John F. Scott, of Pittsburgh, Pa., all my right, title, and interest in this policy, No. 236,992, issued by The Mutual Life Insurance Co., of New York, and for the consideration above expressed I do also, for myself, my executors,

and administrators, guarantee the validity and sufficiency of the foregoing assignment to the above named assignee, his executors, administrators, and assigns, and their title to the said policy will forever warrant and defend.

Dated in Pittsburgh, this 4th day of January, 1883.

ARCHIBALD DICKSON.

In presence of

GEORGE W. RODE.

The opinion of the court below was as follows :—

August 2d, 1884. Under the facts set out in the foregoing case stated, we are of opinion that plaintiff is entitled to recover, to wit, the amount of \$1,011, less the cost of proofs of death, as specified in said statement, and therefore now direct judgment to be entered for plaintiff and against defendant in the sum of one dollar.

The specifications of error were—

1. The court erred in entering judgment for the plaintiff.
2. The court erred in not entering judgment for the defendant.

WILLIAM SCOTT and WILLIAM R. BLAIR, *for Plaintiff in Error.*

GEORGE SHIRAS, JR., and STAGLE & WILEY, *for Defendant in Error.*

PAXSON, J.

While this record does not disclose with certainty the grounds on which the learned judge below ruled the case, we presume from the course of the argument here that he regarded it as coming within the principle of *Gilbert vs. Moose's Administrator*, 41 Leg. Int., 75, which was an admitted case of a wagering policy. We do not, however, regard this as within the authority of *Gilbert vs. Moose*, for the reason that there is nothing in the facts as set forth in the case stated from which the deduction can fairly be drawn that this was a wagering policy. On the contrary, there is enough to show that John F. Scott, the defendant below, had an insurable interest in the life of Archibald Dickson. In the case stated we find, *inter alia*, the following facts : "John F. Scott was not in any manner related to Archibald Dickson, by blood or marriage, nor was he at any time a creditor of Archibald Dickson. Said Scott had been for some years a surety upon Dickson's official bond, but the latter had, to the time of his death, faithfully fulfilled the condition of said bond, and neither principal nor sureties were liable thereon."

It appears to have been assumed that because there had been no breach of the official bond, and the sureties had never been called

upon for payment, that Scott had no insurable interest in the life of Dickson. This was a mistake. The insurable interest is that which existed at the time the insurance was effected, not that which may exist at the time of the death of the assured. There was a time when life insurance was treated as a contract of indemnity merely, and it was held that the interest must continue to the time of death. It was so ruled by Lord Ellenborough, in *Goodsall vs. Bolders*, 9 East, 72 ; but that case was overruled by *Dalby vs. The Life Insurance Co.*, 15 C. B., 365, where it was said by Baron Parke, in construing the statute of 14 George III., which provides that "no insurance shall be made on the life or the lives wherein the assured shall have no interest or by way of gaming or wagering," and "that in all cases wherein the assured hath interest in such life, etc., no greater sum shall be recovered than the amount or value of such interest," that the word "hath" must be construed as necessarily referring to the time of effecting the insurance and not to the time of the death. "As thus interpreted," Justice Bradley says, in *Commonwealth Life Ins. Co. vs. Schaffer*, 94 U. S. R., 457, "we might almost regard the English statute as declaratory of the original common law, and as indicating the proper rule to be observed in this country where that law furnishes the only rule of decision." In that case the policy was taken by husband and wife upon their joint lives, payable to the survivor on the death of either. Subsequently they were divorced a vinculo matrimonii, and the wife, having paid the premiums up to the time of her former husband's death, brought suit on the policy. It was held that the policy, being valid at its inception, the subsequent cessation of her interest in the life insured did not affect her claim, the court saying: "The essential thing is, that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the assured has no interest." This case expressly rules that the policy does not fall with the cessation of the interest.

It requires but a moment's reflection to see that this rule is based upon sound principles. It treats a contract of life insurance, not as a contract of indemnity, as in the case of fire or marine insurance, but as a contract to pay a certain sum of money in the event of death. And if the policy fell with the cessation of insurable interest it would lead to this result: A is a creditor of B to the extent of \$1,000, and insures his life to that amount. He continues the policy until he has paid in premiums, say, \$1,100. B then pays the debt. If the policy ceases as soon as the debt is

paid, A loses all he has paid, and in reality is out of pocket \$100, although he has received his debt in full.

Applying these principles to the case in hand, when Mr. Scott became Dickson's bail on his official bond, he had an interest in his life which he could have protected by taking out a policy directly thereon. That he was never called upon for payment upon this bond is not to the purpose; he might have been. He was liable for any breach of it, and this liability constituted an interest in the life of Dickson, and this interest existed at the time of the alleged assignment of the policy. Hence, I have no doubt, if the assignment was effectual to pass the title to the policy, Scott would be entitled to hold it and recover the insurance money.

But I more than doubt whether the assignment qua assignment was sufficient to pass the title. It was true an assignment was made in form and lodged with the company, in accordance with its rules, but no copy of it was ever given to Scott, nor was he notified thereof, and the policy was retained by Dickson, who continued to pay the premiums up to the time of his death, in pursuance of a request made to the company that the premium notices should be sent to him, Dickson. It was said by Chief Justice Gibson, in *In re Campbell's Estate*, 7 Barr., 100: "A gift is a contract executed; and, as the act of execution is the delivery of possession, it is of the essence of the title. It is the consummation of the contract, which, without it, would be no more than a contract to give, and without efficacy for the want of a consideration. If made on a sufficient consideration it would be a binding agreement; but then the nature of the contract would be changed, and there would still be no gift. The gift of a bond, note, or any other chattel, therefore, cannot be made by words in futuro or by words in præsenti, unaccompanied by such delivery of possession as makes the disposal of the thing irrevocable."

In *Taylor's Appeal*, *Through's Estate*, 25 P. F. S., 115, Trough effected a life insurance, being solvent, and in consideration of one dollar and love and affection for his children, he executed under seal an assignment of the policy to one Hicks in trust for them; put the policy and assignment into an envelope addressed to "John W. Hicks, Plumber, Second St., etc. Please send this to him at my death, H. Trough," and placed the envelope in a safe of his own firm. He paid the premiums until his death, seven years after the assignment, but never communicated the transfer to Hicks, who knew nothing of it until after his death. It was held by this court that the

assignment was invalid for want of a delivery, and the proceeds were awarded to the administrator of Through. In *Zimmerman vs. Struper*, id., 149, there was an indorsement of a gift upon a bond by the testator with a request to his executors to deliver it after his death, but it was held invalid for want of a delivery.

In the case in hand the delivery of the assignment to the company was not the equivalent of a delivery to Scott. The whole thing was in fieri; there was no consideration, and the assignment, being the voluntary act of the assured, was subject to his power of revocation. That circumstances might have arisen which would have made the revocation a matter of some trouble and expense is not to the purpose. The true test was the right to revoke or cancel the assignment. If that existed nothing passed to the assignee at the time of assignment.

There is, however, another view of the case, which we think controls it. It is manifest from the case stated that this policy was intended for the benefit of Scott at the time it was taken out. The application was made by Dickson on December 30, 1882. On the fourth of the following January, only five days thereafter, he went to the office of the company to lift the policy, and when the policy was produced he at once informed the company that he "wanted to transfer it to John F. Scott, the best friend I have in the world." Can there be a doubt that he intended the policy for his friend when he made the application? Had it been made so in form; had he instructed the company to make the loss payable to John F. Scott in case of his death, the transfer would have been perfectly legal, and open to no objection as a wagering policy. The validity of such policies has never been doubted. What followed was the act of the company, not of Dickson. They recommended the assignment as the proper form, and Dickson executed it because it was so recommended, yet his own conduct shows that he did not regard it as an assignment. The effect of an assignment would be to pass the legal title to the policy had it been perfected by delivery. The assignee thereafter would be the party to pay the premiums. But Dickson kept the assignment and continued to pay the premiums himself; directed the notices to be sent to him. He evidently intended his friend to have the benefit of the policy, and bear its burden himself. Had the company altered the policy making the loss payable to Scott, instead of preparing an assignment, they would have carried out Dickson's precise intent. Does the form of the transaction stand in the way? We think not. We may treat the assignment as a

direction to pay the loss to Scott, given at the time the policy was issued, with the same force and effect as if written in the body of the policy. If the transfer to Scott were an after-thought it would be different ; but it was not ; it was a part of the original transaction, and the direction was given before the policy had been taken from the office.

Policies of this nature are in no sense wagering. It would be denying a man's right to do what he will with his own to say that he could not in any form insure his life for the benefit of an indigent relation, or a friend to whom he felt under obligations. And the fact that he continued to pay the premium himself, and retain the control of the policy up to the time of his death, leaves no room for speculation on the improper practices which a few years ago brought such a scandal upon the life insurance business in this State.

The judgment is reversed, and judgment is now entered upon the case stated in favor of the defendant with costs.

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF PENNSYLVANIA

OCTOBER SESSIONS, 1884.

MARGARET CARRIGAN

vs.

MASSACHUSETTS BENEFIT ASS'N.)

The Pennsylvania statute prohibiting an application not attached to the policy to be used in any way to qualify the terms of the contract, does not prohibit the introduction of such an application for the purpose of showing fraud in the procuring of the contract.

Where the policy and by-laws of the company require a written application by the insured, a paper purporting to be an application whose questions were not in fact answered by the insured, but which were answered, and the paper executed throughout by another in her name, the policy procured on such application was a fraud and void.

J. RICH. GRIER, Esq., and JAMES M. WEST Esq., *for Plaintiff.*

W. S. CAMPBELL, Esq., *for Defendant.*

This was an action brought to recover \$5,000 on a policy of insurance on the life of Mary A. McCaffrey, for the benefit of her sister, Margaret Carrigan, the plaintiff. The declaration was in covenant, and set out the policy at length. The defendants filed a plea of "Covenants performed, absque hoc, with leave to give in evidence the special matter," and several special pleas, alleging,—

First. That the application on which the policy was issued, was a forgery, that Mary A. McCaffrey never signed it.

Second. That the insured was in the last stage of consumption at the time the application was made, which represented her to be in robust and perfect health.

Third. That the policy in suit was part of a conspiracy entered into by the plaintiff, the examining physician, and several others, to cheat and defraud the defendant association, and others, out of large sums of money.

The case was tried before Judges McKennen and Butler, in the United States Circuit Court, at Philadelphia, October 15, 1885, and a verdict was rendered for the defendants.

The plaintiff offered in evidence the policy and proofs of loss, and proved the death of the insured, and there rested.

The defendants proved that the signature to the application purporting to be that of Mary McCaffrey was not her genuine signature, whereupon the plaintiff's counsel admitted such to be the fact, but claimed that her name was signed thereto in her absence by one John J. Devlin, who had been told by the insured to sign her name to the application, in case she were not present when it should be presented for her signature.

The defendants then offered in evidence the application, which was objected to by the plaintiff, on the ground that a copy of the application had not been incorporated in or attached to the policy, and in support of this objection, presented and read the following statute, passed by the legislature of Pennsylvania, and approved May 11th, 1881.

BE IT ENACTED, ETC. That all life and fire insurance policies upon the lives or property of persons within this Commonwealth, whether issued by companies organized under the laws of this State, or by foreign companies doing business therein, which contains any reference to the application of the insured or the constitution; by-laws, or other rules of the company, either as forming part of the policy of contract between the parties thereto, or having any bearing on said contract, shall contain, or have attached to said policies, correct copies of the application, as signed by the applicant, and the by-laws referred to; and, unless so attached and accompanying the policy, no such application, constitution or by-laws shall be received in evidence, in any controversy between the parties to, or interested in, the said policy, nor shall such application or by-laws be considered a part of the policy or contract between such parties.

The plaintiff contended, that under this law, the application could not be admitted, that the penalty for a failure to attach a copy of

the application to the policy was the absolute exclusion of the application from the case, and was so intended by the legislature.

The defendants contended that they offered it for the purpose of establishing or showing fraud, and not as a part of the contract of insurance, though the policy referred to it and made it a part of the contract; that the legislature never intended to shield and reward a fraud, but only that the terms of the policy itself should not be varied or modified by the introduction or admission in evidence of the application where no copy was attached to the policy.

After argument of counsel, the court rendered the following decision:—

JUDGE BUTLER said:—When this case was previously tried this application was produced, as it is now, for the purpose of proving fraud, as opened. I said then it was not necessary to consider (in the view I took of the law) whether the statute is in any case applicable to the trial of a cause in this court. I intimated no opinion or judgment, or impression respecting it. Since that time, this question has been decided—not upon this statute, but upon a similar statute, in New York. The statute, therefore, is applicable to a trial in this court.

The decision of that question, however, now, as it then was, is unnecessary, because the statute, in the judgment of the court, is inapplicable to a case such as this. To my mind it is plain (in view of the history of judicial decision upon the subject of representations and warranties) that the purpose of this statute was to exclude the application where it is not attached to the policy, but is sought to be made a part of the contract, so as to qualify or affect the terms of the policy. It is inapplicable to a case where the purpose is to show, as here, that there was no application made by the insured, that the company was deceived and imposed upon, in the presentation of a paper purporting to be the application of the individual insured, when it was not. No such case was contemplated by the legislature or there would have been a provision to protect a party under such circumstances, against the use of the application. How could the fraud alleged here, if it exists, be set up in the absence of the paper? Suppose the defendants had undertaken to show in the absence of the paper that it was a forgery, by calling witnesses who swear they had seen it and knew the handwriting of this girl, and that the signature is not hers? We could not receive it; the paper must be present and the jury must see it.

JUDGE McKENNAN said:—The act of assembly says that an application made and not attached to the policy shall not be used in any way to qualify the terms of the contract. But the application is the foundation of the policy, it rests upon it, and can it not be shown that the company was procured to issue this policy by the execution of a fraudulent application? It strikes at the obligation of the policy itself. It is not to be regarded touching the construction of the paper itself, but as to the subsistence of the policy as an instrument binding the company. That seems to be a common-sense construction of the act of assembly.

The application having been admitted in evidence, the defendants' counsel, in view of the admission made by plaintiff, that Mary McCaffrey did not herself sign the application, here requested the court to charge the jury, without going further into the evidence, that as a matter of law the plaintiff could not recover if the application were signed in the manner set forth in the admission.

After a lengthy argument of counsel, the following opinion of the court was rendered by Judge Butler, Judge McKennan concurring:—

BUTLER, J.

Gentlemen of the jury:—The plaintiff put in evidence the policy of insurance and proofs of death, and there rested.

The defendants, charging that the policy was fraudulently obtained by means of a paper, which, while it purported to be the application of Mary McCaffrey, the assured, was not such, but was made and executed in her name by another in her absence, called witnesses to sustain the charge. Among these witnesses was the plaintiff in the suit, who testified that the signature was not Mary McCaffrey's.

When the case had reached this situation, the plaintiff's counsel arose and admitted that the paper purporting to be the application of the assured, was not signed by her nor in her presence, stating at the same time, that the person who signed it had been told by her, that if an application for an insurance was brought to the house in her absence he should sign it for her.

Here the case rested. In this state of the evidence, the plaintiff, in our judgment, cannot recover. The policy and by-laws of the company require the written application of the assured, embracing answers to various interrogatories made and executed by her in per-

son. The paper before us, purporting to be her application was presented to the company, and the policy thus obtained. This (whether designed or not) was a fraud. Upon its face, the policy shows that it was issued in the belief that the paper was the application of Mary McCaffrey, executed by her in person, containing her answers, over her signature, to the various questions therein propounded; and that such an application is the foundation of the contract between the parties.

The company was left in ignorance of the true character of the paper. There is no evidence whatever that either the company or its agent had knowledge of the fact that the paper was other than what it purported to be. Had it been informed of the circumstances—that Mary McCaffrey had not answered the questions, but that the paper was executed throughout by another in her name, it may safely be concluded that the policy would not have been issued. The concealment of these circumstances must therefore be regarded as a fraud, rendering the policy void.

It was urged on behalf of the plaintiff that the admission of the paper, here called an application, is prohibited by the Pennsylvania statute cited, and that it cannot, therefore, be considered in this connection. If this were true, it is probable the plaintiff's admission above referred to would of itself sufficiently establish the fact of imposition, on which the defendant relies. It is not true, however. The legislature did not contemplate such a case as this, and the statute is clearly inapplicable. The paper here, as we have already indicated, is not an application within the meaning of the statute any more than it is within that of the policy. It is not the application of the assured except in appearance. It is but a deceptive pretense.

While, therefore, we have admitted the paper in evidence, it is not for the purpose of opening its contents to contestation, but simply as a means of proving that no application, within the meaning of the policy, was made; and that the defendant was fraudulently induced to enter into a contract of insurance without any reciprocal obligation on the part of the assured, as is plainly contemplated in the policy itself.

SUPREME COURT OF ILLINOIS.

Appealed from the Appellate Court for 3d District, Originally Appealed from Morgan County C. C.

ESTATE OF MICHAEL RAPP

vs.

PHOENIX INS. CO.*

An agent's penal bond with surety conditioned that the agent shall promptly pay over moneys received, and truly perform the duties of his agency, discloses a sufficient consideration to support the undertaking of the obligees while the agency continues and become immediately binding upon its execution and delivery. Such a bond differs from that of a guaranty of future advances which requires as its consideration an advance or credit given and which has no binding force until such credit has been given.

Such a penal bond is not terminated by the death of the surety as to funds afterwards coming into the hands of the agent, but may be enforced against his personal representatives.

But the principal impliedly stipulates that he will not retain the agent after a known breach of the guaranty, and such retention will release the surety.

The retention of such agent, who was obligated to make monthly settlements after notice of his default, releases the estate of the surety as to any subsequent default.

Statement of the Case.

This is an action against the estate of M. Rapp. The insurance company appointed J. B. Booker & Co. its agents, and by the contract of appointment, said agents were to make with the company a full settlement of each month's business at the end of each and every month while they should remain the company's agents; that said agents were not appointed for any specified time; that M. Rapp signed the bond in evidence, that said agents shall well and truly perform all and singularly the duties, and to account for and pay over the same to the said company when demanded, and comply with all instructions furnished him from the office of said company

* Decision rendered, March 30, 1885.

etc. Bond in the sum of \$1,000. Rapp died 10th of March, 1882; that the agents of the company had actual notice of the death of Rapp at the time of his death, the same having been published in the newspapers. The agents faithfully made their monthly settlements with appellee or company for ten months after the death of M. Rapp, and paid the company all that was due it up to January 1, 1883; and that said agents failed to make a settlement with the company for the month of January, 1883, and also failed to make a settlement for the month of February, 1883; that the company did not notify the executors of M. Rapp, of the failure of said agents to make the January, 1883, settlement, until after the failure to make the February settlement; that the claim filed shows correctly the sums received by said agents in the months of January and February, 1883, which they failed to pay over. The entire deficit of the agents was \$260. The court charged the estate of Rapp with the default for January, which, as already appears, amounted to \$188.90, but refused to allow the one for February, and the company assigned as a cross-error the ruling of the court in rejecting the latter claim.

MULKEY, J.

It is contended by appellant that the bond in question is, in legal effect, the same as a guaranty of future advances to the extent of \$1,000; that it did not become binding or operative upon the makers until money or other property belonging to the company came into the hands of J. B. Booker & Co., as its agents; that money or property thus coming into their hands is to be regarded in the nature of future advances, and to be governed by the same rules of law that are applicable to such advances; that the contract being indefinite as to its duration, either party had the right to terminate it on notice; that it existed, so to speak, by the continued desire or joint will of the parties, and as this, in the nature of things, could not extend beyond their lives, and as Rapp could not, after his decease, terminate the contract by notice, the law itself terminated it, and hence Rapp's estate is not bound for anything that occurred after his death. Such is the position of appellant, as we understand it.

The bond in question is something more than an ordinary contract of guaranty. It is a joint and several contract between Joseph H. Booker, Albert H. Brace, and M. Rapp, on the one side, and appellee on the other. The contract discloses upon its face that Booker and Brace, under the style of J. B. Booker & Co., had

been appointed agents of appellee in conducting the insurance business, and that by virtue of their appointment, and the service upon which they had or were then about to enter, certain moneys, chattels, and effects would come into their hands, which of itself disclosed a sufficient consideration to support the undertaking of the obligors so long as the agency continued. The contract therefore became binding immediately upon the execution of the instrument, and had a default on the part of the agents occurred in the lifetime of Rapp, there is no question but that a joint action might have been maintained on the bond against all three of the obligors. The instrument then was a written contract whereby the obligors, jointly and severally, bound themselves, their executors and administrators, to the extent of \$1,000, for the faithful discharge of the duties of two of them in a certain specified business of a confidential character. Two of the obligors stipulate for their own honesty and business fidelity; the other joins in the stipulation, and also individually guarantees the same thing. It is to be observed, that, unlike an ordinary continuing guaranty, as it is claimed this is, nothing is to be done by any of the parties to the instrument to give effect to make it binding upon them, as is always the case where the payment of future advances merely, is guaranteed. The difference between the two cases is well illustrated by the language of the court in *Jordan et al. vs. Dobbins*, 122 Mass., 168, cited and relied on in appellant's brief. In that case the goods sued for were sold after the guarantor's death, and the court, in holding there could be no recovery, among other things said: An agreement to guarantee the payment by another of goods to be sold in the future, not founded upon any present consideration passing to the guarantor, is a contract of a peculiar character. Until acted upon it imposes no obligation, and creates no liability in the guarantor. After it is acted upon, the sale of the goods upon the credit of the guaranty is the only consideration for the conditional promise of the guarantor to pay for them. It is in the nature of an authority to sell goods upon the credit of the guarantor, rather than a contract which cannot be rescinded. Thus such a guaranty is revoked by the guarantor at any time before it is acted upon. Such being the nature of the guaranty, we are of opinion that the death of the guarantor operates as a revocation of it, and that the person holding it cannot recover against his executor for goods sold after the death."

Without expressing any opinion for the present in respect to the conclusion reached in that case, we fully concur in the general ex-

pression of the court with regard to the peculiar character of a continuing guaranty where it is supported by no consideration other than advances to be made at a future day, and where the party to whom the guaranty is given assumes no obligation to make such advances, as is generally the case with such guaranties. But the transaction now under consideration can hardly be said to be a guaranty of this character. Taking a common-sense, business view of the matter, the giving of the bond and its acceptance by the company were the final acts by which Booker & Brace were clothed with authority to open an insurance office at Jacksonville, in the name and on behalf of the company. And there can be no doubt but that the intrusting them with its business, and permitting them to conduct it with the public in the company's name, was a sufficient consideration, independent of the fact the instrument was under seal, to support the agreement in question. In these respects the Dobbin's case is wholly unlike the one in hand. In this case no additional act was to be done by appellee or any one else, to give the bond effect. Business was commenced and continued under it for a long time, satisfactorily to all parties. Even according to the rule applicable to continuing guaranties, strictly so-called, the bond under consideration was in full force and effect long before Rapp's death. We have looked with considerable care to see if the general principles applicable to a continuing guaranty of the kind mentioned have ever been extended to an ordinary agents' bond, as is sought to be done here, and we have wholly failed to find any authority for it, and certainly none has been cited.

Considerable space in appellant's brief is occupied in an effort to show that Rapp's liability upon the bond could have been terminated at any time before his death by his giving the company notice to that effect. Whether his liability could have been thus terminated in his lifetime, or whether his executors might in this manner have terminated it after his decease, are questions which do not directly arise on this record, as it is not pretended any such notice was given, either before or after his death. But as these questions probably have more or less bearing upon the main question in the case, presently to be stated, they may be incidentally noticed further on.

The controlling question in the case is, whether, upon Rapp's death, the bond in question, by mere operation of law, ceased to have any legal effect as to subsequent transactions between the company and its agents J. B. Booker & Co. It is a familiar rule of law that requires no citation of authority for its support, that the death of the

principal is, per se, a revocation of the agent's authority, and hence all contracts or other engagements subsequently entered into by the latter, on behalf of the principal, are absolutely void as to his legal representatives, and this notwithstanding the death of the principal was unknown at the time such contracts or other engagements were entered into. On the other hand, the general rule unquestionably is, that all contracts entered into by one, not of a personal character, are equally binding upon himself and his legal representatives after his decease. This general rule is well stated in Chitty on Contracts, (10th Am. Ed.), page 101. The author says: "It is a presumption that the parties to a contract bind not only themselves, but their personal representatives. Executors, therefore, are held to be liable on all contracts of the testator which are broken in his lifetime, and, with the exception of contracts in which personal skill or taste is required on all such contracts broken after his death; and such parties may likewise sue on a contract, although they be not named therein." In the present case, however, Rapp, as we have already seen, expressly binds his executors and administrators, and hence no question of presumption of liability can arise, so far as Rapp's legal representatives are concerned, for if it be possible to bind them by any terms they are certainly bound.

Appellant contends, however, as the bond is nothing more than an ordinary continuing guaranty, without limitation as to time, and could not for that reason have extended, in any event, beyond the guarantor's life, the provision expressly binding his personal representatives must have been intended to apply only to such default as might occur during his lifetime. For reasons already appearing, and others hereafter to be stated, we do not think this view is sound. In support of the proposition that the bond in question ceased to have any legal effect or binding force upon the death of Rapp, as to all subsequent transactions, four cases are cited and relied on, namely, Pratt vs. Trustees etc., 93 Ill., 575; Jendervine et al. vs. Rose et al., 36 Mich., 54; Harris vs. Fawcett, 15 Law Rep. Ex. C., 311, and Jordan et al. vs. Dobbin, already referred to.

The principle applied to the Pratt case, and upon which it was decided, is the well-recognized doctrine that a mere voluntary proposition may be withdrawn at any time before such action is taken under it as will, in law, show not only its acceptance, but also a sufficient consideration to sustain it as a contract. In every case of a mere voluntary proposition, if the party making it die before any action has been taken under it, his death will, in law, operate as a

withdrawal of the proposition—consequently it cannot be accepted or acted upon afterwards so as to bind his estate. The principle here stated and which was applied to the Pratt case we do not think has any application to this case: *Jendervine et al. vs. Rcse et al.*, supra, in some of its features is much like the case before us. The bond in that case was a guaranty of future sales; in this it is a guaranty of the honesty and fidelity of particular persons in a specified business. In that the money sought to be recovered was the price of goods sold after the obligee in the bond had been expressly notified not to make any further sales on the faith of the defendant's guaranty. In this case, neither Rapp in his lifetime, nor his executors, after his decease, gave any such notice.

It will thus be seen that the two cases differ materially in a number of important particulars, so that there is no ground for the claim that that case controls this.

Harris vs. Fawcett, supra, was a chancery proceeding. The [contract] in that case was one of future advances, wherein it was expressly provided the guaranty should continue for six months, notice in writing, under the hand of the guarantor, "to discontinue the same." The guarantor died, leaving as his executor the debtor, for whose benefit the guarantee had been given. The right to terminate the contract by six months' notice was expressly reserved in the contract itself. But as the death of the guarantor rendered it impossible to give the kind of a notice provided for, namely, a notice under the guarantor's own hand,—a fact to which the court seems to have attached considerable importance,—it was held, as the contract was clearly not intended to continue forever, the estate of the guarantor, under the circumstances, was not bound for advances made after his death. In the present case there is no provision in the contract of the obligors by which they are authorized to terminate their liability on the bond, and the duration of their liability is therein expressly declared to be during the time J. B. Booker & Co. officiate as agents of the insurance company—so it is clear the contract in this case is essentially different from the one in that, but the reasoning in that case, as just observed, is clearly against the appellant in this.

We think there is an essential difference between a guaranty of future advances, whether in a form of bond, or, as usually the case, of a mere stipulation, and a bond executed by an agent and his sureties for the faithful discharge of the former's duties in some business or employment, as was the case here. Such a bond is, in all its essential features, like the bond of an executor, guardian, trustee,

and the like. The only difference between the two cases is, that most of these bonds are required to be taken by express statutory provision. We have no doubt of the correctness of the ruling of the trial court in allowing appellee's claim to the extent it did.

We are of opinion the court also ruled properly in refusing to allow appellee the amount of deficit for the month of February,—not on the ground, however, the bond had become *functus officia*, but because the company, in retaining in its service J. B. Booker & Co., after notice of the January default, which was just cause for discharging them, violated a duty which it impliedly assumed to Rapp and his legal representatives on accepting the bond. When the employer of a clerk or other agent takes from another a bond of indemnity, or other instrument, guaranteeing the honesty and fidelity of such clerk or agent while in the service of the employer, the latter impliedly stipulates that he will not knowingly retain such clerk or agent in his service after a breach of the guaranty justifying his discharge, and that in the event he does so without the surety's consent, it is to be at the employer's own risk. This is not only fair dealing and common honesty, but it is a rule of law also. The principal here announced is well established by the authorities : *Philips vs. Foxall*, 27 L. T. (N. S.), 231 ; 7 L. R. Q. B., 666; *Anderson vs. Asten* 28 L. T. (N. S.), 35 ; 8 L. R. Exch., 73.

Judgment of appellate court affirmed.

DICKEY and CRAIG, JJ.

We cannot concur in this decision. We think this bond, on the part of the surety, is simply a continuing guaranty by him of the good conduct of the agents of the insurance company—that the relations of the parties were in their nature capable of determination at the will of either the insurance company or of the agents in question, or at the will of the surety. This surety certainly could not be held indefinitely, but by notice of his unwillingness to be bound further, could relieve himself from liability accruing thereafter. In this his case differs from that of surety for an officer, executor, or guardian. We think the death of the surety operated to determinate his obligation as to moneys coming to the hands of the agents thereafter. On this latter question the authorities are not in harmony. We, however, think the reason of the matter is decidedly in favor of the proposition that in this regard death was equivalent to notice: See *Jendervine vs. Rose*, 36 Mich., 54; *Jordan vs. Dobbins*, 122 Mass., 168.

COURT OF APPEALS OF NEW YORK.

HENRY W. HUBBELL, *Appellant*,

vs.

PACIFIC MUTUAL INS. CO., *Respondent*.*

A mere preliminary contract to insure is one for which an action lies for the breach, and the loss may be recovered. Under such contract the insurer is within a reasonable time bound to issue a policy, and the insured to pay the premium upon its issue. Either party not in default may compel performance, or, treating the refusal as an abandonment, may terminate the contract.

The custom in the case of a marine policy was to issue the policy in ten or twenty days upon delivery of a note or payment of premium. But before the time had expired the applicant became insolvent and made an assignment.

Held, That the assignee took the contract subject to the payment of premium or giving of a note.

The applicant and assignee were notified by the insurer that it would not be bound unless the premium was properly secured, but they did nothing.

Held, That this was a virtual abandonment of the contract, which was further evidenced by the parties procuring a new and different insurance upon the same cargo insured.

Held, That the subsequent acceptance of premium by the company under similar circumstances in the case of another contract where there had been no loss, was not a waiver of the default here, the company might recognize the validity of one contract where it was to its interest, and deny that of the other at its election.

GEORGE H. FORSTER, *for Appellant*.WILLIAM ALLEN BUTLER, *for Respondent*.

FINCH, J.

It has been held that such a preliminary contract of insurance as was made in this case is not, in and of itself, and standing alone, the basis of an action, but amounts to an agreement to insure upon

* Decision rendered, October, 1885.

the terms of the usual policy afterward to be issued, for a breach of which agreement an action lies, and the loss may be recovered: *Ellis vs. Albany City Fire Ins. Co.*, 50 N. Y., 402; *De Grove vs. Metropolitan Ins. Co.*, 61 N. Y., 594. This doctrine implies that essential conditions of the contract remain to be performed, and that the insurance takes effect upon that assumption. These conditions are subsequent in point of time, but on each side precedent to the right of action. The insurer is bound to issue the policy in the usual and ordinary way and within the usual and reasonable time, and within the same time the insured is bound to pay the premium, or if credit is allowed to give the customary note. But the insured is not bound to pay if the policy is refused, and the insurer is not bound to deliver the policy if the premium or the stipulated note is withheld. Either party not in default may compel performance by the other, or treating the refusal as an abandonment, may himself join in the abandonment and so terminate the contract and destroy its existence: *Graves vs. White*, 87 N. Y., 463; *New Eng. Iron Co. vs. Gilbert E. R. R. Co.*, 91 N. Y., 168. If in such case the breach on one side is such as to indicate an intent to abandon or repudiate the agreement, the other party may assert, and so the contract be dissolved.

In the present case neither party performed, or offered to perform, the mutual conditions within the agreed or customary time, and both parties appear to have abandoned the contract. It was made on the 8th of October, 1867, through Bell & Hayward, who acted as brokers and agents for both parties. The custom was that in ten or twenty days the policy would be issued upon payment of the premium or the delivery of a note of the insured. Such note, where credit was to be given, appears to have been not only the customary condition, but essential and material. It not only fixed the term of credit beyond dispute, but showed that payment had not in fact been made, and in the hands of the insurer could be discounted and used as business paper whenever the exigency of losses or expenses should require. Of course, the custom permitted this credit only in the case of responsible parties, and when the note tendered was assumed or understood to be good. But within the customary twenty days two things happened. The plaintiff became insolvent, so that his premium note, if offered, would have been worthless; and he made a general assignment of all his property for the benefit of creditors. From that date the insurable interest in the cargo of the ship *Stuart Wortley* passed out of the plaintiff and to his as-

signees, and they became the owners of his contract of insurance, and of all his rights under it. But they took it cum onere ; they took it as he held it, subject to the payment of the premium or the delivery of the premium note.

The insolvency of plaintiff did not, per se, terminate the contract, but it gave to the insurer an equitable right to demand and receive, instead of the worthless note of plaintiff, the note of the new owners of the contract or of some responsible parties, or payment of the premium in cash. Such a notice was given by Bell & Hayward in behalf of the insurers to both plaintiff and his assignees. They were explicitly told that the insurers would not be bound unless the premium was properly secured. The plaintiff and his assignees took no steps in that direction. They paid no premium ; they tendered no premium note ; they demanded no policy. There was thus not only a breach of the agreement now sued upon, but affirmative action indicating an intent to abandon the contract and justifying that conviction on the part of the insurers, for the assignor and assignees took part in procuring a new and different insurance upon the cargo of the vessel. That cargo was hemp, purchased in Manila, through letters of credit issued by English bankers who were protected by a lien upon the cargo through bills of lading and who procured for their own safety a new insurance. That for the benefit of Brown Brothers & Co. was procured in New York, valuing the pound sterling as drawn for at \$8.50, instead of \$10.50, as in the original insurance ; and the remaining two dollars of such valuation, representing expected profits on the cargo, was covered by an insurance taken in the name either of assignor or assignees. The portion of the cargo paid for out of the letter of credit issued by the English and American Bank was in like manner insured for the benefit of that institution, but in foreign companies.

It turned out that the *Stuart Worley* had been wrecked in the China seas, and her cargo totally lost in the previous September, and before even the date of the contract with defendant. The protest of the captain, detailing the circumstances of the wreck appears to have arrived in December, and soon thereafter proofs of loss were made, and the insurance was collected. That paid for the full cargo, including estimated profits. The default of plaintiff in not paying or securing the premium, accompanied by his failure and that of his assignees to demand a policy or take note of its absence, and their action in procuring a new insurance, and this in the face of a notice that they must give a good note or the contract would be

deemed not binding, fully justified the insurers in inferring an intent to abandon the contract which their concurrence made effective. And such mutual assent is rendered certain and conclusive by the further fact that with the exception of a single incident hereafter to be noticed, nothing transpired between these parties for over seven years, and whatever else may be the effect of that long silence and inaction, it assuredly bears conclusively upon the mutual intent to abandon, and the knowledge and assent of each party of and to such abandonment. So far and upon this state of facts the inference was inevitable and dependent upon no controversy in the proofs.

But the appellant claims that there would have been such controversy, and the question of abandonment would have gone to the jury, if evidence offered by him had not been illegally excluded. He sought to prove that an item in an account rendered in 1872, under date of April, 1868, was for an insurance premium in a case where no policy had been issued, and where the agreement was similar to that relating to the cargo of the *Stuart Wortley* which evidence was excluded. The ruling was unimportant, since at a later period of the case all the facts relating to this item were admitted, and it was shown in substance that it must have referred to the insurance upon the *Stuart Wortley*, or the *Ashburton*, which arrived safely, no policy having been issued in either case, and the item charging an unpaid premium as an existing debt. Upon those facts it is argued that the question of abandonment should have gone to the jury and the court erred in dismissing the complaint. The item referred to was not shown to have related to the premium on the *Stuart Wortley*, and cannot, therefore, be urged as a recognition of that insurance as a subsisting contract, and a waiver of the non-payment of the premium or non-delivery of a sufficient note. But yet, it is said, it must then have been a charge for the premium on the *Ashburton*. We may grant so much, but because in that case there was a breach of the contract, it does not necessarily follow that there was a mutual abandonment or that the unknown facts of that case would have warranted the inference as they did in this; and because a default may have been waived in one case there is no inference that it was also waived in another and different one. The insurer was not bound to treat both alike so far as his own action was concerned. However unjust or unreasonable it might be not to do so, no law compelled the insurer, if he waived a default in one case, to waive it also in another. The company might recognize the contract as to the *Ashburton*, which arrived safely, and on whose cargo there was no

loss, and collect the premium, if plaintiff did not object, and its interest lay in that direction; but it would not at all follow from that or justify an inference that the insurer waived a default in the case of the *Stuart Worley* and re-instated that abandoned contract for the purpose of becoming liable for the large loss known to have happened. So that the facts relied on did not change the situation or raise a question for the jury.

The judgment should be affirmed with costs.

All concur.

SUPREME COURT OF MASSACHUSETTS.

JACKSON CO.

vs.

BOYLSTON MUT. INS. CO.)

The insurance was on cotton in transit. The receipts of the railroad carrier stipulated that in case of loss or damage during transportation, the company incurring the liability should have the benefit of any insurance. The insurer had no knowledge of the receipts.

Held, That where carrier and insurer are alike liable for the loss, the general rule is that the latter, upon paying the loss, is subrogated to the claims of the owner against the carrier. But the owner is not obligated to so contract as that he may have a remedy against the carrier. The insurer is entitled to preference only where there is no agreement to the contrary.

Held, That the agreement with the carrier did not violate a policy clause forbidding the interest insured to be sold, assigned, transferred, or pledged.

Held, That in the absence of fraud, the insurer making no inquiry regarding the bills of lading, insured subject to their stipulations.

ELIAS MERWIN and ROBERT H. GARDINER, JR., *for Plaintiff*.

PRINCE and PEABODY, *for Defendant*.

DEVENS, J.

This action is on a policy of insurance by which the defendant insured the plaintiff on cotton in transit between ports and places in the United States, and the plaintiff's mills in New Hampshire. The cotton was bought by one Ivy, as broker for the plaintiff, and shipped by him by the Atlanta & West Point Railroad Company, and connecting lines. It was in two lots, and Ivy, attaching the two railroad receipts to a draft, drew on the plaintiff for the amount of the purchases. The draft, with the railroad receipts attached, was received by the plaintiff's treasurer on October 17, 1883, and paid on

presentation, after which he gave notice to the defendant of the shipments, and presented the policy that they might be indorsed thereon, which was done. The railroad receipts given on behalf of the Atlanta & West Point Railroad Company and connecting lines, contained a stipulation that in case of loss or damage to the cotton sustained during transportation, whereby legal liability was incurred, only that company should be responsible in whose actual custody the cotton was at the time of the occurrence; and, further, that "the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton." There was an additional agreement in the stipulation as to the mode of computing the value of the property, not now important.

Ivy did not read the railroad receipts, and it does not appear whether he did or did not know their contents, so far as the clause relating to insurance is concerned. The railroad receipts were not sent to the defendant, nor their contents communicated, nor did it ask to see them. It did not appear that the defendant knew whether they were received. The plaintiff's treasurer did not read them, nor did he or the plaintiff know that receipts containing such a clause would be, or were likely to be taken, and no fraud or concealment from defendant was intended.

While in transit and in the actual custody of the South Carolina Railroad, a common carrier, and one of the connecting lines of the Atlanta & West Point Railroad, and in the State of South Carolina, thirty-six bales of the lot of cotton before described were destroyed by a fire, the origin and cause of which are unknown. For the value of these this action is brought.

It is the contention of the defendant that whether the contract between the plaintiff and the carrier is governed by the law of Massachusetts, Georgia, or South Carolina, it was, so far as it stipulated in favor of the carrier, for the benefit of any insurance that might have been effected, valid and binding upon the plaintiff. While this question has been thoroughly discussed on both sides, and with careful examination of the statutes and decisions in each State, it will not be necessary to decide it. In the view we take of the case, we shall assume, in favor of the defendant's contention, that the stipulation was valid and binding between the plaintiff and the carrier. If it be thus held, the defendant contends that this was a contract in violation of the rights of the defendant, and rendered the policy void for the reason that when the insurer of goods in the custody of

a carrier pays the loss on the goods insured to the owner, he is ordinarily entitled to be put in the place of the owner and clothed with all his rights : *Hart vs. Western R. Corp.*, 13 Metc., 99.

The defendant further contends that, this being the well-recognized law at the time of the contract of insurance, both plaintiff and defendant must have contemplated this right of subrogation in case of loss, and, if the plaintiff has destroyed it by a contract which would deprive the defendant of this right, the policy is avoided.

Subrogation is the substitution of one person in place of another, whether as a creditor, or the possessor of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities. It does not necessarily depend upon contract, but grows out of the relation which two parties sustain to each other, and the party subrogated acquires no greater rights than those of the party for whom he is substituted. It is, as a general principle, true, that if goods are injured by transportation under such circumstances that the carrier and the insurer are alike liable therefor, and if the insurer pays for such injury, he will be subrogated to such claim as the owner may have against the carrier ; and this, apparently, because the liability of the carrier is treated as primary, while that of the insurer is secondary only. The contract of insurance being one of indemnity, the insurer, when he has indemnified the insured, is equitably entitled to succeed to the right which he had against the carrier. But as the insurance company obtains its remedy against the carrier, not by virtue of any contract of its own with him, but through the contract of the owner of the goods, such owner may make the contract of carriage so as to suit his own interest, provided there be no fraudulent concealment from the insurer, and the right which the insurer obtains is subject to the agreement made with the carrier. Carriers have an insurable interest in the goods they transport, and may therefore effect insurance upon them for their own benefit. There is no reason why they may not insure them jointly with the owner, and if so, why they may not contract for the benefit of insurance effected by the owner, in the absence of fraud or any contract to the contrary with the insurer: *Chase vs. Washington Ins. Co.*, 12 Barb., 595 ; *Van Natta vs. Mutual Sec. Ins. Co.*, 2 Sandf., 490. The owner is under no obligation to contract so that he shall have a remedy against the carrier under every circumstance in which the carrier has been held liable by the common law. If he may accept a receipt excusing the carrier from liability for fire, and still hold the insurer,

he may also make a contract that the insurance shall be for the benefit of the carrier. The defendant contends that by reason of the existence of this right of subrogation, the plaintiff has obtained its insurance at a lower rate than it otherwise would have done; but it is also true that by an agreement that the carrier shall have the benefit of the insurance, he has probably obtained the carriage of his goods at a lower rate of transportation. The insurer as against the carrier is entitled to preference only when there is no agreement to the contrary, and the insured thus has a claim against the carrier. If the carrier may insure on his account, he may contract with the person whose goods he carries that such persons shall insure for his benefit. While the question has not been the subject of discussion in this Commonwealth, these remarks are well sustained by respectable authority elsewhere.

In *Mercantile Ins. Co. vs. Calebs*, 20 N. Y., 173, it was held that the carrier of goods might, by contract with the owner, secure to himself, in case of loss or damage to the goods, for which the carrier would be liable, the benefit of any insurance to be effected by the owner; and that such a clause in a contract of carriage, although made without the assent or knowledge of the insurer, was not a fraud on his rights. This case did not present the element of negligence on the part of the carrier.

In *Phoenix Ins. Co. vs. Erie & W. Transp. Co.*, 10 Biss., 18, it appeared that the loss was occasioned by the negligence of the servants of the carrier, and it was held that even if the carrier could not, as between himself and the shipper, have contracted that he should not be liable for his own negligence or that of his servants, he was entitled to contract with the shipper for the benefit of his insurance. Having so done, the insurance company, which had paid the shipper, obtained no right of action by subrogation against the carrier. The contract between the insured and the carrier being valid, the latter was protected from any action by the insurer. To the same effect, see *Rintoul vs. New York Cent. & H. R. R.*, 17 Fed. Rep., 905.

The case on which the defendant mainly relies (*Carstairs vs. Mechanics & Traders' Ins. Co.*, 18 Fed. Rep., 473), is readily distinguishable by the important fact that it was there expressly stipulated that in case of loss the insurance company should be subrogated to all claims against the transporter. When, therefore, the insured took from the carrier a bill of lading, containing a clause similar to that which is found in the case at the bar, he made it impossible to do

that which in terms he had agreed in the policy issued to him that he would do, and was not therefore, entitled to recover upon it. While the contract in terms made with the insurer by the insured could not be modified by him, this presents no reason why he may not modify a right of subrogation which depended only on his own relations to the carrier by changing those relations.

There is no grounds in the case at bar upon which any fraud or concealment can be asserted. The receipts which would be given for carriage the plaintiff well knew would be various, as the cotton would pass through States controlled by different laws. The right of the owner so to contract that the carrier should have the benefit of his insurance, the defendant must have known had been asserted, as it became a subject of judicial decision as early as 1859 : *Mercantile Ins. Co. vs. Calebs*, *ubi supra*. It made no inquiries and the plaintiff's officers did not know of the existence of the clause.

Nor can the position of the defendant, that this agreement was in violation of the clause in the policy by which it is agreed that "this insurance shall be void in case the policy or the interest insured thereby shall be sold, assigned, transferred, or pledged without the consent in writing of the insurers," be maintained. The policy and the interest in it is still retained by the owner ; it is neither transferred nor pledged. There is a collateral agreement only that the carrier having incurred a liability shall have the benefit of the insurance that may have been effected.

The validity of the contract between the plaintiff and the carrier being conceded, we are brought to the conclusion expressed in the ruling of the judge who presided at the trial, "that in a case where there was no intention to deprive the insurance company of its rights, and no intentional fraud and concealment, and where, the plaintiff itself was actually ignorant of the stipulation relied on at the time it made the insurance, or obtained the indorsement on the policy, and was ignorant when it ordered the cotton that any such stipulation would be made, and there was no actual misrepresentation, an insurance company insuring property in transitu, making no provision in regard to the nature of the contract of carriage, and not requesting to see the bill of lading or receipt, and making no inquiries about them, must be held to have insured it under and subject to the actual contract of carriage, so far as it was a lawful contract. The defendant has no just grounds of complaint against the ruling, which was in these terms. Judgment on the verdict.

UNITED STATES CIRCUIT COURT OF CONNECTICUT.

PEORIA SUGAR REFINING CO.)

vs. }

PEOPLE'S FIRE INS. CO.*

The insurer was furnished a memorandum by the agent of the insured, containing among other things the statement, "building detached on all sides," but not stating any distances from other buildings. The policy thereupon issued upon the factory and machinery, provided that the insurance might be continued for such further term as might be agreed on, the premium therefor being paid, and a renewal receipt being given; and it should be considered as continued under the original representation in so far as not varied by a new representation in writing, which should, in all cases, be made when the risk had been changed, either within itself or by surrounding or adjacent buildings; otherwise the policy and renewal should be void. Also that if, after the insurance had been effected either by the original policy or renewal, it should be void, if the risk be increased without notice and indorsement. A warehouse forty feet distant was subsequently built by insured. Afterwards insured applied to "renew by new policy," whereupon a new policy was issued renewing the pre-existing insurance and containing the same provisions. The property was destroyed through a fire originating in the warehouse.

Held, That a failure to notify the insurer of the erection of the warehouse avoided the policy.

Held, That the warehouse was not an "addition" within the policy.

ALVINE P. HYDE and FRANKLIN D. LOCKE, *for Plaintiff*.

CHARLES E. PERKINS, *for Defendant*.

SHIPMAN, J.

This is an action at law which was tried by the court, the parties having, by written stipulation duly signed, waived a trial by jury. The facts which are found to have been proved, and to be true, are as follows: In February, 1880, the plaintiff employed Frederick D. Hamlin, as its insurance broker, to procure insurance upon its prop-

* Decision rendered, September 10, 1885.

erty to a large amount. He was not able to obtain the entire amount that was desired, and employed William W. Buckley & Co., as his sub-agents or brokers, to obtain for the plaintiff a portion of said insurance. Said Buckley, as the plaintiff's agent, and not in behalf of the defendant, applied on March 3, 1880, to the defendant, an insurance company in Middletown, Connecticut, for insurance on the plaintiff's brick, grape-sugar manufactory, and on the machinery contained therein. He also furnished to the defendant a memorandum, containing a simple diagram of the lower story of the plaintiff's factory, and written statements in regard to the characteristics and valuations of the property to be insured.

The only statement which is important in the present case is the following: "Building detached on all sides." The memorandum did not indicate how near any other buildings were to the insured property. It was entirely detached from, and not within 40 feet of, any other building. The defendant issued to plaintiff a policy of insurance for \$1,000 upon its factory; for \$1,000 upon its machinery contained therein,—for the term of one year from March 4, 1880. Said policy contained the following provisions:—

Insurance once made may be continued for such further terms as may be agreed on, the premium therefor being paid, and a renewal receipt being given for the same; and it shall be considered as continued under the original representation in so far as it may not be varied by a new representation, in writing, which, in all cases, it shall be incumbent on the party insured to make when the risk has been changed, either within itself or by the surrounding or adjacent buildings; otherwise said policy and renewal shall be void and of no effect.

In May, 1880, the plaintiff built a warehouse, 144 feet long, and 40 5-12 feet distant from the main factory. The first story was of brick and the second story was of wood. All but the brick part was covered by an iron sheeting. The second story of the main building and the second story of the warehouse were connected by an iron skeleton bridge, which was used by the workmen as a passage-way. The bridge was originally of wood, but was changed to iron at the suggestion of some insurance men. There was also an underground passage, about four feet square, lined with wood, between the two buildings. This was not used as a passage-way for men nor to run feed, but as a place for pipes, and through it ran the large water-pipe which supplied the main building. The wooden lining was not scorched at the time of the fire, so that when the factory was rebuilt

the same underground connection between the two buildings was again used. In the basement of the warehouse were two iron revolving cylindrical drums or dryers for drying feed. They were heated by iron steam-pipes to about 160 degrees Fahrenheit, and made six revolutions per minute.

The main factory and its contents were entirely destroyed by fire on October 27, 1881. The fire originated in the warehouse in a room near the dryers, but how or from what cause it originated is unknown. A strong wind which was blowing at the time carried the fire to the main factory. On February 24, 1881, said Buckley applied in writing, for the plaintiff, to the defendant to "renew by new policy" said policy, which was to expire March 4, 1881, "divisions same as last year; rate increased to 1½ per cent." By "divisions" the respective amounts on building and machinery were meant.

In pursuance of this application for renewal, and without any examination, or other representations or survey, the defendant issued a new policy, whereby said pre-existing insurance for \$2,000 was renewed for one year, ending March 4, 1882. The risk had been increased by the erection of the new building. The action is brought upon the new policy. It contained the same provisions which have been quoted, and, except in rate, was a substantial repetition of the old policy. The defense is that after the date of the first policy, and before the renewal, the risk had been materially changed by the erection of the warehouse, of which no notice was given to the defendant; and that when the renewal was obtained, no information was given of the increased risk.

The position of the case is this: The memorandum made no representations as to the distance between the main factory and any other building. It simply said, "Building detached on all sides;" and no evidence was offered by the defendant to show that the connection by the underground wood-lined conduit increased the risk or made any material change of the representation; so that no attention need be given to any supposed increase of risk from the conduit. There was, as testified, an increase of risk by the erection of the new building within 41 feet from the main factory.

The question, then, arises, does the quoted provision in the policy require that, when a renewal is obtained upon a risk which had been increased during the preceding term, without the knowledge of the insurer, in a particular concerning which no representations were made in the original application, information of such increase of risk shall be given upon the request for a renewal? The language of the

provision is : " Which [new representation], in all cases, it shall be incumbent on the party insured to make when the risk has been changed," etc. If this was the only provision in the policy in regard to notice of change of risk, there would be good ground for the opinion that a new representation was incumbent upon the insured only when an original representation had been made in regard to the particulars which had been changed, and that when silence had originally existed, the insured was not called upon to make new representations. But the policy also says :—

If, after insurance is effected, either by the original policy or by the renewal thereof, * * * if the risk be increased by any means whatever within the knowledge of the assured, * * * without immediate notice to the company, and indorsement made on the policy, this insurance shall be void and of no effect.

The contract thus provided that when the risk was materially increased after insurance was effected, by any means known to the insured, notice must be given or the policy would become void. It can hardly be the fair construction of the policy that it could be avoided, during the continuance of the first term, by an increase of risk unknown to the insurer, and that when the insurance was renewed, without notice or knowledge of the increase, the renewal should be valid. The intent of the policy was to make it incumbent upon the insured, after the original insurance was effected, to inform the insurer of any material changes in the character of the risk by known means. He was compelled by the stringent provisions of his contract to affirmatively tell the insurer of a material increase in the risk which occurred after the insurance was effected, and, if no such information had been given, to tell the insurer of such increase when a renewal was asked for. The duty to give such information seems not to depend upon the fact that representations had been made prior to the original insurance which had become incorrect.

But the plaintiff says that the provisions of the policy in regard to continuing or renewed insurance are applicable only when the renewal is evidenced or shown by a renewal receipt. This construction, though plausible, does not seem to me to be fair. The policy says that insurance once made may be continued for an agreed time, a renewal receipt being given therefor ; that is, the insurance may be continued after the expiration of the original term, and may be evidenced by a renewal receipt, and a new policy is not necessary. The policy then says : " it," i. e., the insurance continued for an agreed

term, "shall be considered as continued under the original representation," etc. "It" refers to the renewed insurance, but is not limited to renewed insurance evidenced by a renewal receipt. Such a limitation would be unjust to the insurer, and is inconsistent with good faith on the part of the insured when he asks to have the insurance renewed by a new policy.

It must be observed that in this part of the case there are three facts of importance : (1) The careful provisions of the policy which made it incumbent upon the insured to give notice of any material change in the risk by known means; (2) the defendant was expressly requested to renew the insurance and to renew by a new policy; (3) the new policy was a substantial repetition of the terms of the original policy except in the rate, the change therein having been directed by the applicant. What would be the state of the law in a case in which either of these conditions did not exist, it is not necessary to consider. By the policy permission was given "to make additions, alterations, and repairs." A building 40 feet distant from the insured building, though connected with it by a bridge and an underground passage, cannot, with propriety, be called an "addition." It is a new and separate building, while it is attached to the main factory in the way that has been stated.

SUPREME COURT OF WISCONSIN.

Appeal from County Court, Milwaukee County.

GEORGE H. NOYES

vs.

NORTHWESTERN NAT. INS. CO.*

The policy, among other things, covered wearing apparel, and the insured property was described as "contained in a frame dwelling etc."

Held, That a sealskin dolman destroyed while temporarily absent in a fur store for repairs was still covered by the policy. The words "contained in" are only a warranty as to the usual place of deposit when the articles are not elsewhere as an incident to their use.

Held, That the case was not affected by the risk being greater at the fur store.

The defendant issued to the plaintiff its policy of insurance, by which it insured him against loss by fire to the amount of \$2,000, as follows: "On household furniture, useful and ornamental, beds, bedding, linen, family wearing apparel, printed books and music, silver plate and plated ware, pictures, paintings, engravings, and mirrors and their frames, at not exceeding actual cost, pianoforte, and sewing-machine, if any, fuel and family provisions, all contained in the two-storied, frame dwelling-house, occupied by the assured and known as 302 Farwell Avenue, Milwaukee, Wisconsin." During the term of the policy the plaintiff sent a sealskin dolman, which was part of the wearing apparel thus insured, to the store of T. A. Chapman & Co., in the city of Milwaukee, for repairs. The dolman was originally purchased of that firm, and that was a proper place to send it

* Opinion filed, November 3, 1885.

for such purpose. When not in use, the usual place of deposit of the dolman was in the dwelling-house, 302 Farwell Avenue, designated in the policy. On the same day the dolman was so sent for repairs, and before it could have been repaired in the usual course of business, the store of Chapman & Co., and its contents, including the dolman, were destroyed by fire.

This is an action on the policy to recover for such loss. On the above facts the county court found as conclusions of law as follows: "First. That the words 'contained in,' as used in said policy, are to be construed with reference to the property to which they are to be applied,—in this case a part of the family 'wearing apparel,'—and mean that the dwelling-house of the plaintiff was the usual place of deposit of such wearing apparel, when not absent therefrom for temporary purposes incidental to its customary use and enjoyment. Second. That the taking and leaving of said dolman at the store of T. A. Chapman & Co., as above found, was incidental to the ordinary and customary use and enjoyment of such property, and the same was not absent from its usual place of deposit in the plaintiff's dwelling-house, an unreasonable length of time. Third. That the plaintiff is entitled to recover against the defendant the value of said garment so destroyed by fire, to wit: the sum of two hundred and fifty dollars, with interest on the same from the twenty-fourth day of October, A. D. 1884, and the costs of this action." The defendant appeals from the judgment for the plaintiff, entered pursuant to such conclusions of law.

MARKHAM & NOYES, *for Respondent*, George H. Noyes.

JENKINS, WINKLER & SMITH, *for Appellant*, Northwestern Nat. Ins. Co.

LYON, J.

The decision of this case turns entirely upon the effect of the words "contained in," as used in the policy to specify the location of the insured property. In a policy upon personal property, which, from its character and ordinary use, is kept continuously in one place, as a stock of merchandise, machinery in a building, household furniture, or goods stored, the rule undoubtedly is that the location of the property designated in the policy is an essential element of the risk, and usually a continuing warranty. In such a case the policy covers the goods only so long as they remain in the designated place; and if they are destroyed elsewhere, the insurer is not liable for the loss. It is maintained by the plaintiff that the rule is not

applicable to a case where the insured property is of such a character that its temporary removal or absence from the specified place is necessarily incident to its use and enjoyment, and such use may be presumed to have been in contemplation of the parties when they made the contract of insurance. It is also claimed that in such a case the location of the property is specified in the policy merely to designate the accustomed place of deposit when the property is not absent therefrom in the course of its ordinary use; and if the property be burned when so absent (the place of deposit remaining unchanged), the insurer is liable for the loss. This is such a case. The dolman was a garment for out-door wear, and necessarily would be chiefly used away from the designated dwelling-house. It would or might be necessary from time to time to send it to a furrier for repairs; and it was liable to be burned when so absent from the place of deposit. It must be presumed that the parties entered into the contract of insurance in contemplation of these incidents, for they are matters of common knowledge.

Under these circumstances, we think the rule contended for by the plaintiff is eminently reasonable and just when applied to this case. It is abundantly sustained by the adjudication of courts of high authority, supported by arguments which are entirely satisfactory to us. We can only refer briefly to some of the cases. In *Peterson vs. Mississippi Valley Ins. Co.*, 24 Iowa, 494, the policy insured, with other property, "seven horses, * * * situated section 22," etc. The policy (like the one in suit) contained the usual stipulation that if the risk should be increased by any means, without the assent of the insurer, the policy should become void. The assured, a farmer, while hauling his grain to market with two of the horses, put up for the night at a hotel, distant from section 22. During the night the hotel barn in which the horses were stabled was destroyed by fire, and one of the insured horses was burned to death. Held, that the risk was not limited to the use of the horses on section 22, but extended to the usual and ordinary use of them elsewhere, and that the company was liable for the loss of the horse. *Mills vs. Farmers' Ins. Co.*, 37 Iowa, 400, was a policy insuring "live-stock on premises situated sec. 7, 76, 27." A horse owned by the insured, and usually kept on the designated premises, was killed by lightning at a place six miles distant from such premises, when the owner was driving him to mill. Held, that the insurer was liable. In *McCluer vs. Girard F. & M. Ins. Co.*, 43 Iowa, 349, the policy covered a phaeton "contained in a frame barn," and the vehicle was destroyed

by fire while at a carriage shop undergoing repairs, and where it was subject to an increased risk. The insurance company was held liable for the loss. In *Longneville vs. Western Assurance Co.*, 51 Iowa, 553, s. c., 2 N. W. Rep., 394, the policy covered "family wearing apparel contained in two-story, frame dwelling on lot 6," etc. While riding in a sleigh along a street certain wearing apparel of the assured was burned. Held, the loss was recoverable under the policy. In *Everett vs. Continental Ins. Co.*, 21 Minn., 76, the property insured was a threshing-machine "stored in barn on sec. 36, 23, R. 28, owned and insured by L. L. Chaffin." The machine was burned when standing in a field on that section. The company was held liable. Judge Berry delivering the opinion of the court, said: "But whatever might have been the purpose of the location of the machine in the application and policy, there is no ground whatever for contending that it was, in letter or in spirit, a promissory stipulation on the part of the insured, or a condition of insurance on the part of the insurer, that this location should remain unchanged, or, if changed, that while changed the insurance should cease or be suspended: *Smith vs. Mechanics & Traders' Ins. Co.*, 32 N. Y., 399, and cases cited; *Blood vs. Howard Fire Ins. Co.*, 12 Cush., 472; *Fland. Ins.*, 241, 255, 269, 485."

Holbrook vs. St. Paul F. & M. Ins. Co., 25 Minn., 229, is a case in which mules were insured as being all contained in a certain barn. For the purpose of plowing, and also of repairing such barn, they were removed to another barn on another section, where the loss occurred. The company was held liable under the policy for the loss. *London & Lancashire Fire Ins. Co. vs. Graves* (superior court Ky.), 12 INS. LAW J., 308, is very closely in point. Buggies were insured as "contained in" a certain livery-stable. They were burned while in a carriage factory for repairs. Held, that the absence of the buggies from the designated place of deposit for repairs was an incident of their use and permitted by the policy, and that the insurer was liable. There is a valuable note to this case by the editor of the *INSURANCE LAW JOURNAL*, in which many cases bearing upon this question are cited and commented upon. The same doctrine is recognized by the superior court of Rhode Island in *Lyons vs. Providence Washington Ins. Co.*, 12 INS. LAW J., 188; but in that case there was a permanent removal of the insured property from the place designated in the policy, and for that reason the insurer was relieved from liability.

The question we are considering is now first presented to this

court. It is doubtless true that there is conflict in the cases in which it has been considered. It is our duty to choose between these conflicting lines of adjudication, and to adopt the doctrine which best commends itself to our judgment. We discharge this duty when we hold (as we do) that the words in the policy, "contained in the two-story, frame dwelling-house," etc., when applied to the dolman in question, do not constitute a continuing warranty that the same shall always be kept in such dwelling, which would relieve the insurer from liability should it be burned elsewhere; but they are only a warranty that the place designated shall be the usual place of deposit, when the dolman should not be in customary use elsewhere, and if burned when in such use, it is still covered by the policy, and the insurer is liable. Also that it was a reasonable and proper use of the dolman to send it to the furrier for repairs, and it is immaterial that the risk of loss was greater in the furrier's store than in the dwelling-house designated in the policy. The learned county judge so held, and the judgment is in strict accord with his conclusions of law. Judgment affirmed.

SUPREME COURT OF WISCONSIN.

Appeal from Circuit Court, Winnebago County.

ZIELKE

vs.

LONDON ASSURANCE CORPORATION.*

Evidence that the insured presented a list of the articles destroyed and the value of each article, to the agent of the company, which was examined by him and returned without objection or requiring any further proof, and that the agent at the same time compelled plaintiff to submit privately to a full examination under oath as to the particulars of the loss, and reduced the same to writing, and expressed himself satisfied therewith, and carried the same away and kept it until the trial; *Held*, admissible, although such facts were not pleaded as a waiver or estoppel.

In such a case, evidence is admissible to show that in reducing the examination of the insured to writing, by mistake or fraud she was represented not to be the owner of the property destroyed, and to correct such statement without pleading the mistake or fraud.

The statement made by the agent of the insurer to the husband of the insured as to what the company would do in regard to the loss, *Held*, admissible to show that the insurer denied any liability and refused to pay the loss, and that the necessity of formal proofs of loss was dispensed with.

Presentation to the agent of the insurer of a list of the articles destroyed, with the value of each, and the examination and retention thereof by the agent, followed by an examination under oath of the insured, taken in writing and carried away as satisfactory by the agent, will amount to a waiver of any further proofs of loss, and a waiver of any defects therein.

WEISBROD, HARSHAW & NEVITT, for Respondent, Mathilde Zielke.

GARY & BERRY, for Appellant, London Assurance Corp.

ORTON, J.

The questions raised and discussed on this appeal are mainly of fact and incidentally only of law.

* Opinion filed, November 3, 1888.—From *Northwestern Reporter*.

1. The complaint alleges that the plaintiff furnished to the company due proofs of loss, and he attempted to prove such allegation by showing that the plaintiff presented in time a long list or schedule of the property destroyed, and the value of each article, to the agent of the company, which was examined by him, and returned without objection to the form or authentication thereof, and without requiring any other or further proofs, and at the same time said agent compelled the plaintiff to submit privately to a full examination under oath as to the particulars of said loss, and reduced the same to writing, and expressed himself satisfied therewith, and carried the same away, and kept it until the trial. The learned counsel of the appellant contends that such evidence being introduced to prove a waiver of any proofs of loss, and an estoppel of the company to claim the same, or to insist upon the performance of such condition, such waiver and estoppel should have been pleaded. We do not understand that such evidence tended merely to prove a complete waiver of any proofs of loss, but rather to prove the making of the proofs of loss required by the policy, in such manner and form as required by the company at the time, as a compliance with the condition of the policy in that respect, and if it showed any waiver, it was as to the mere form of the written proofs and their authentication. The long list of the articles destroyed, and showing the value of each, contained all the substance of such a list authenticated and made in the form required by the policy, and the personal examination of the plaintiff on oath was provided for by the policy and was required by the company in addition to the proofs furnished by such list. The question is not so much of a waiver of this condition of the policy as of a substantial compliance with such condition to the satisfaction of the company. But if this is not the true theory of the legal effect of such evidence, the plaintiff could not anticipate that the defendant would deny the allegation of the complaint that due proofs of loss were furnished. In either view, the waiver or estoppel was not required to be pleaded by the plaintiff. The authorities cited by the learned counsel would be applicable to cases when the cause of action or defense depended mainly upon an estoppel.

2 In reducing the examination of the plaintiff to writing by the agent of the company, she was made to say that she was not the owner of the personal property destroyed. On the trial the plaintiff demanded the production of said writing, and then offered to show

that such statement therein was a mistake or not true. It is contended by the learned counsel that if that paper was to be attacked for fraud, it should have been pleaded. This question was decided in *McKesson vs. Sherman*, 51 Wis., 303; s. c., 8 N. W. Rep., 202, in which it was said that "no good reason is perceived why any instrument may not be attacked as fraudulently obtained, even before and in anticipation of its introduction by the opposite party." In that case the instrument had been misread, when the plaintiff was unable to read, and false statements made therein. In this case the plaintiff had never seen the writing, and did not know its contents, although it purported to be her examination on oath, and she being a German woman, and not understanding much English, when the writing was produced she found that such statement therein was not made by her on her oral examination, and she was properly allowed to testify to the facts in correction of said writing.

3. Fred. Zielke, the husband of the plaintiff, was employed by her to settle the loss for her with one Iott, the agent of the company, and in his interview with Iott for such purpose asked him "what he was going to do about this settlement about the fire business?" and he testified that Iott said in reply that "he wouldn't pay anything what was lost at all;" that "this company was not liable to pay anything for it;" that "the last answer he gave me was that they would not pay anything; the reason was this property was too cheap." The learned counsel contends that this testimony was not within such agency to settle the claim of the plaintiff with the company, and therefore inadmissible. The husband, as the agent of the plaintiff for this purpose, certainly had a right to ask the agent what he would do about such settlement; and if that was within the agency, why was not the agent's reply? Suppose the agent had said in reply that the company would pay some part of the claim, would not that have been within the agency to settle? And suppose, further, that the agent of the plaintiff said that he accepted such proposition, and would take such part payment in full satisfaction of the plaintiff's claim, would not she have been bound by such a settlement? The answer was as much within the agency as the question. The bare statement of the proposition is sufficient. The jury found on this evidence that the company denied all liability, and refused to pay the plaintiff the loss after it had occurred. This finding, if sustained by the evidence, and we think it was, would dispense with the necessity of formal proofs of loss: *McBride vs. Insurance Co.*,

30 Wis., 562 ; *Parker vs. Insurance Co.*, 34 Wis., 363 ; *Harriman vs. Queen Ins. Co.*, 49 Wis., 71 ; s. c., 5 N. W. Rep., 12.

4. The testimony of the plaintiff that she presented to the agent of the company, as proofs of loss, a list or schedule of the property destroyed and showing its value, and that he examined it and made no objection to the form of it or its want of other authentication, but soon thereafter required her to submit to a full examination under oath in respect to such loss ; that he carried the same away and expressed his satisfaction therewith, and said it was sufficient, and that nothing more would be required of her,—if believed by the jury, would have warranted a finding that such proofs of loss were furnished as called for by the policy, with a waiver of any further proofs, and this evidence, by the decisions of this court, was a waiver of any defects therein: *Killips vs. Insurance Co.*, 28 Wis., 472 ; *O'Conner vs. Insurance Co.*, 31 Wis., 160 ; *Badger vs. Phoenix Ins. Co.*, 49 Wis., 398 ; s. c. 5 N. W. Rep., 848. There were other points taken, but not important, and do not affect the merits of the action or the verdict. There was a conflict of evidence between the agents of the company and the plaintiff upon most all material points, and the jury had the right to believe the plaintiff, and, so believing, their verdict was sustained by the evidence. We think the charge of the court was fair and correct, and not liable to the criticisms made upon it in the appellant's brief.

We can find no error in the record. The judgment of the circuit court is affirmed.

UNITED STATES CIRCUIT COURT.

DISTRICT OF OREGON.

D. P. THOMPSON, RECEIVER,)

vs.)

PHENIX INS. CO.*)

A policy of insurance contained in effect this stipulation: (1) No action shall be commenced thereon to recover for a loss thereunder until the amount thereof was ascertained by agreement or arbitration; and (2) No such action shall be maintained unless commenced within one year after the date of the fire from which the loss occurred. *Held*, That unless the assured was prevented by the action or non-action of the insurer, in the matter of ascertaining the amount of the loss, he must commence his action therefor within the time specified in the stipulation.

A demurrer to the bill for the reformation of a policy of insurance will be sustained, when it appears that by reason of the lapse of time, no action can be maintained thereon for any cause, when reformed. A court will only decree the reformation of an instrument as a means of enabling a party thereto to assert or maintain some right thereunder.

MR. HENRY ACH, *for Plaintiff*.MR. P. L. WILLIS AND MR. MILTON SMITH, *for Defendant*.

DEADY, J.

On April 21, 1884, the defendant, in consideration of the sum of \$300, paid to it by E. S. Kearney, insured him, as "Receiver for Holladay vs. Holladay" in the sum of \$500 against loss or damage by fire on a half interest in the Clarendon Hotel and furniture, for the term of one year from April 27th; and on the night of May 19, 1884, the property was destroyed by fire.

This suit was brought on July 10, 1885, to reform the policy by the plaintiff, as the successor of Kearney in said receivership.

* Decision rendered, November 5, 1885.

The bill alleges that by mistake the policy was made payable to said Kearney "instead of the receiver in said suit of Holladay vs. Holladay, and his successors, and for the benefit of whom it might concern;" and prays that it may be reformed by adding therein, after the words "E. S. Kearney," the words "'as receiver in the suit of Benjamin Holladay against Joseph Holladay, for and on account of his successors, as such receiver, and for the benefit of whom it might concern,' and that the sum so insured by said defendant on said building and furniture be paid to your orator accordingly."

The defendant demurs to the bill, and for cause of demurrer, assigns, among others, the following: "The plaintiff's right is barred, because he did not commence this suit within twelve months next after the date of the fire from which the loss occurred."

The policy contains a stipulation, to the effect, that a loss arising thereunder is not payable until the proof thereof is furnished, and in case of arbitration, the award fixing the amount thereof is had; and also this:

"It is furthermore hereby expressly provided and mutually agreed, that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be maintainable in any court of law or chancery, until after an award shall be obtained, fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the date of the fire from which such loss shall occur; and should any suit or action be commenced against this company, after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

There is no claim that the right to bring this suit has been delayed over a year from the date of the fire from which the loss occurred, by any dispute concerning the value of the property destroyed. On the contrary, it appears from the bill that the proof of the loss was duly made, and that the amount is not contested, but that the payment thereof is refused to the plaintiff solely on the grounds that by the terms of the policy it is payable to Kearney only.

Therefore, the question does not arise in this case, whether an action could be maintained on this policy by the assured, after the expiration of a year from the date of the fire, in case he had been delayed in the commencement of the same, on account of a dispute and arbitration concerning the amount of the loss.

Cases may arise under such a policy, when the dispute and arbi-

tration are, without any fault of the assured, so prolonged, that unless he is allowed to commence an action after the expiration of a year from the date of the fire, he would, under the combined operation of these two stipulations, be deprived of all legal remedy.

But in this case the suit was not brought until thirteen months and twenty-one days after the fire at which the loss occurred, and no excuse or reason is given for the delay.

It is well established that a stipulation limiting the time within which an action may be brought on a policy of insurance is valid and binding on the parties thereto; but that if it is ambiguous, either in itself or taken in connection with other provisions or stipulations in the policy, the ambiguity must be resolved in favor of the assured. See *Spare vs. Home Mutual Insurance Company*, 9 Saw., 145, and cases there cited.

The stipulation for limitation in this policy is, considered by itself, plain and susceptible of but one meaning; and putting aside the provision concerning an award as inapplicable in this instance, there is nothing in the policy to qualify or render it doubtful.

Unlike the stipulation in *Spare vs. Home Mutual Insurance Company*, supra, in which the right to sue was limited to one year from the time the loss "occurred," which, in conjunction with the sixty days also allowed the company to ascertain whether any loss had "occurred," and make payment thereof, was held to mean one year from the expiration of said sixty days, the limitation in this case is a year from a day certain, to wit: the day of the fire. And unless the assured is prevented by the action or non-action of the company in the matter of ascertaining the amount of the loss, from commencing an action within that time, he must do so or he will be barred therefrom.

But it is said that this is a suit to reform this contract, as well as to enforce it, and that the stipulation as to time does not apply to a suit for such relief, and therefore the demurrer is too broad and must be overruled.

But the court will not reform an instrument, merely for the sake of reforming it, but only to enable a party to assert some right thereunder. And if an action thereon by the assured to recover the amount of loss is already barred by lapse of time, there is no claim that can be asserted under it against the defendant.

In *Davidson vs. Phoenix Insurance Company*, 14 Saw., 594, Mr. Justice Field held, in a case like this, that when the remedy on the policy for the insurance was barred, according to the stipulation

therein, by lapse of time, the court would not undertake to reform the instrument, because there was "no occasion" for so doing.

This conclusion is not reached without reluctance. So far as appears, there is, in good morals, no sufficient reason why the defendant should not pay this claim according to the real intention of the parties to the contract—that is, to the receiver for the time being in the case of *Holladay vs. Holladay*, for the benefit of whom it may concern. Such cases as this suggest the necessity of some legislation simplifying the contract of insurance, and within certain limits, declaring its effect; and in case of loss, who may claim the benefit of it, and maintain an action against the insurer to enforce it.

But as it is, the parties to this contract have deliberately agreed, that unless the assured brings his action to recover for the loss within a year from the date of the fire, he is forever barred from so doing, and the court cannot disregard the stipulation.

Nor is it intended to suggest that this limitation of the time in which to sue is either unwise or unjust. In this class of cases especially, every consideration of justice and convenience require that claims for losses should be speedily settled, while the witnesses are within reach and the facts are fresh in their recollection.

But the law should have come to the aid of this defective contract, and authorized the plaintiff to maintain an action thereon to recover this loss, as the successor in office of the person who affected the insurance, for the benefit of whom it might concern, without any reformation of the instrument, or delay on that account.

The demurrer is sustained and the bill dismissed.

SUPREME COURT OF CALIFORNIA.

HATCH

vs.

NEW ZEALAND INS. CO.*

The property was described as in warehouse No. 1, on the corner of T. and K. Streets.

Held, That where it sufficiently appeared that the described property was in the warehouse on the corner, which was, however, warehouse No. 2, the misdescription as to the number will not affect right of recovery.

W. S. GOODFELLOW, *for Appellant*.

J. R. BRANDON, *for Respondent*.

THORNTON, J.

The defendant insured the property of the plaintiff in the Overland Free Warehouse, situate at the northeast corner of Third and King Streets, San Francisco. It makes no difference that this building was styled in the policy Overland Free Warehouse No. 1. As it was actually Overland Free Warehouse No. 2, instead of No. 1, the part of the description No. 1 in the policy should be rejected as false. No. 2 was the warehouse at the corner, while No. 1 was forty-six feet distant from it. If the property intended to be conveyed is described in a deed as Overland Free Warehouse No. 1, situate on the northeast corner of Third and King Streets, San Francisco, upon proof that a warehouse of that name was situate at the northeast corner of the streets named, such warehouse would be held to pass to the grantee, though described as No. 1, when it was really No. 2.

* Opinion filed, June 22, 1888.

It appearing by the proof of the actual condition of the property that the description No. 1 was false, and that the remaining description of the property sufficiently identified it, the false part should be rejected. We know no reason why this rule does not apply to a description of property in a policy of insurance, as well as to a description of property in a conveyance.

The findings sufficiently identify the warehouse in which the property insured was stored.

There is no error, and the judgment and order are affirmed.
Ordered accordingly.

SHARPSTEIN, J., and MYRICK, J., concurred.

SUPREME COURT OF TEXAS.

THOMAS DWYER

vs.

CONTINENTAL INS. CO.)

Every fact which may throw light upon the transaction, as by illustrating the possible motive of the insured, is proper evidence when the defense is alleged arson. But declarations of the insured must be so connected with the transaction as to be part of the *res gesta*.

STATTON, J.

The parties agreed that the sole issues in the cause were as to the cause of the fire and the value of the goods lost. The defense was that the fire was caused by the procurement and consent of the insured, and the evidence tending to support this was circumstantial. In such a case every fact which may throw light upon the transaction, as by illustrating the motive which may have caused the insured to burn his own property—facts going to show over-insurance on the property, proof of loss in excess of that actually sustained, the assignment of policy after a loss in a manner other than the usual course of business or for an improper purpose, the disposition of goods in an unusual manner just before the burning, and other like matters—may be considered in connection with other evidence in cause, to ascertain whether such facts existed as are made the defense in this case. Proof of loss made by the insured to appellee and other insurance companies was proper evidence to go to the jury with all the declarations therein contained as to the manner in which appellant held the several policies at the time the fire occurred, there being no controversy as to the latter fact. Evidence

showing that the policies were transferred to appellant after the fire and without consideration was also admissible. Where the insured was absent from the city when the fire occurred, which was at night, and the theory of the defense was that it was fired by one of his clerks, and after a witness had spoken of the number of persons gathered about the fire, he was permitted, over objection, to state that "there was some talk of arresting all of the clerks that night for complicity in the fire. Thomas Dwyer said to me: 'You need have no fear. If you and Lobe are arrested, I'll go your bail, but Allan can go to jail.'" Held, the first part of this statement was inadmissible. The parties making the declarations were not shown to have been so connected with the transaction, or with the persons whose interests were to be affected by them, as to make them admissible as *res gestae*.

Reversed and remanded.

LOWER COURT DECISIONS.

ASSIGNMENT OF WIFE'S POLICY AS COLLATERAL.

Superior Court of Hartford Co., Connecticut.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

vs.

SUSAN WESTERVELT AND OTHERS.*

An indorsement of her name in blank by a wife upon a policy of insurance upon the life of her husband, taken out for her benefit and payable to her or her assigns, with a delivery of the policy to the husband, to enable him to use it as collateral security in obtaining a loan, will be valid and binding in equity in favor of the party making the loan, and the wife will not be permitted to deny the power of the husband to fill up the assignment.

Where the husband, without the authority or knowledge of the wife, filled out the assignment of the policy, not merely as security for the proposed loan, but also as security to a creditor for a pre-existing debt, it was held that the wife was not bound by the latter assignment.

The assignment of such a policy by a wife is valid in this State.

By the laws of New York, where the husband and wife resided, such an assignment was invalid. The policy was issued by an insurance company of this State and the assignment was made in the State of New Jersey, where such assignments were valid. *Held*, That the laws of New York could not operate in the case.

Bill of interpleader ; in the superior court in Hartford County, September term, 1879.

H. C. ROBINSON, *for the Plaintiffs.*

S. FESSENDEN, for Susan A. Westervelt.

G. G. SILL, for assigns of Susan A. Westervelt.

Hovey, J.

The Connecticut Mutual Life Insurance Company, by a policy of insurance signed in their behalf by their president and secretary at Hartford in this State, on the 13th day of March, 1860, and counter-

*From advance sheets of Connecticut Reports.

signed by their agent at New York on the 15th day of the same month, assured the life of Samuel P. Westervelt, then of Morrisania, in the State of New York, for the sole use of his wife, the said Susan Westervelt, in the sum of five thousand dollars, for the whole term of his life, in consideration of the sum of two hundred and fourteen dollars, then paid by the said Susan Westervelt, and of an annual premium to be paid on or before the 13th day of March in every year while the policy continued. By the terms of the policy the sum insured was made payable to the said Susan Westervelt, her executors, administrators, or assigns, for her sole use, within ninety days after due notice and proof of the death of the said Samuel P. Westervelt, after deducting therefrom all notes taken for premiums unpaid at that date. And in case of the death of the said Susan before that of said Samuel, the insurance was made payable to her children or their guardians, if under age, for their use, upon like proofs. The policy was delivered to the assured in the city of New York by the agent of the said company in that city, on or about the 15th day of March, 1860. The annual premiums were paid by the said Samuel P. Westervelt until and including the one due on the 13th of March, 1876, and those which were payable on the 13th of March in the years 1877 and 1878 were paid by the said Ralph P. Westervelt.

In the month of June, 1875, the said Samuel P. Westervelt, requested the said Susan Westervelt to indorse the said policy of insurance in blank and deliver the same to him, in order that he might use it as collateral security for the payment of a check drawn by the said Ralph P. Westervelt and delivered to him, the said Samuel, and upon which he, the said Samuel, desired to obtain the money at the Fifth National Bank of the city of New York. The said Susan thereupon indorsed her name upon the policy and delivered the policy to the said Samuel P. Westervelt so indorsed. Soon afterwards, that is to say, on or about the 15th day of June, 1875, the said Samuel P. Westervelt purchased, in the name of the said Susan, a farm in Westchester County, in the State of New York, and took a deed thereof in her name. The consideration stipulated by him to be paid therefor was twelve thousand dollars.

In the latter part of the year 1875, the said Samuel P. Westervelt was indebted to the said Mary H. Westervelt and Anna M. Fenner, for money lent, in the sum of fourteen hundred dollars; and one thousand dollars, parcel of the consideration stipulated to be paid for said sum being about to fall due

and become payable, he, the said Samuel, applied to the said Mary H. Westervelt and Anna M. Fenner to raise him the sum of three thousand dollars on the security of a second mortgage on certain property in Harlem, New York ; but this they refused to do, as the security offered was not satisfactory to them. A few days afterwards he again applied to them through the said Ralph P. Westervelt, to raise him the said sum, offering as security therefor the note of the said Susan Westervelt, and an assignment of the said policy of insurance ; and they agreed with him that they would raise the money. They accordingly borrowed of the Mutual Life Insurance Company of New York the said sum of three thousand dollars, and mortgaged their real estate in Paterson, New Jersey, where they resided, to secure its payment ; and on the 22d day of January, 1876, at said Paterson, they loaned the said sum to the said Samuel P. Westervelt and received from him at the same place the note of the said Susan of that date for the amount thereof, payable one year after date, at the residence of the said Susan in New York City. They also received from the said Samuel, at the said time and place, the said policy of insurance assigned to them, and the said Ralph P. Westervelt, in the form set forth in their answer to the present petition. That note was afterwards lost or accidentally destroyed, and the said Susan Westervelt gave a new note of the same tenor, amount, and date, in the place thereof. The said Susan also ratified the assignment of said policy, so far as it purported to be an assignment to the said Mary H. Westervelt and Anna M. Fenner. But she never authorized the assignment of any portion of the said policy or of the sum insured thereby to the said Ralph P. Westervelt, and never ratified the assignment made to him on said policy.

The said Samuel P. Westervelt paid from the money loaned him by the said Mary H. Westervelt and Anna M. Fenner, to the said Ralph P. Westervelt \$700, to the said Mary and Anna \$700, in part payment of a debt of \$1,400 which he owed them, \$100 for the expenses incurred by the insurance company in searching the title to the lands mortgaged to them as aforesaid by the said Mary H. Westervelt and Anna M. Fenner, and the remaining \$1,500 he retained himself.

The assignment to Ralph P. Westervelt was made without any lawful authority whatever, and, as appears by his answer, not to secure the payment of a loan made at the time to the said Samuel P. Westervelt, but to secure a pre-existing debt.

The said Mary H. Westervelt and Anna M. Fenner had no knowledge of the circumstances under which the policy was delivered

to the said Samuel P. Westervelt by the said Susan Westervelt, but supposed and believed, and were justified in supposing and believing, that it was delivered to him for the purpose of enabling him to borrow of them the said sum of three thousand dollars, and to secure the payment thereof by the assignment written upon said policy. The said policy was not obtained by the said Samuel P. Westervelt, from the said Susan Westervelt by duress or force, as alleged by the said Susan in her answer; nor was the said Susan compelled to sign her name on the back of said policy by the violence of her husband, as in said answer is alleged. But if these allegations were true, they could not be allowed to affect the rights of the said Mary H. Westervelt and Anna M. Fenner, first, because, at the time they received the assignment of the policy, they had no notice or knowledge of them, and secondly, because the assignment was ratified and confirmed by the said Susan Westervelt. This perhaps sufficiently disposes of another claim made by the said Susan Westervelt upon the hearing, and that is, that she only signed her name on the back of the policy when there was no writing which purported to be an assignment or any writing of any kind upon it, and therefore that the assignment should not be treated as her act. But as the claim was made it may be as well perhaps to decide it. The question raised by this claim has never, to my knowledge, been before the courts of this State, but it came before the Supreme Court of Illinois in the case of *Norwood vs. Guerdon*, 60 Ill., 253, and it was there held, and I think correctly, that where a person insured his life for the benefit of his wife, and she indorsed her name on the policy in blank, and the husband procured a loan of money and pledged the policy as collateral security for its payment, the wife should not be permitted to deny the power of the husband to fill up the assignment; and that such an assignment was valid and binding in equity. Lawrence, C. J., in giving the opinion of the court, says: "It is, however, urged that the wife of *Norwood* never consented to the assignment of the original policy to *Guerdon*, or at least there is no proof of such consent; but she placed her name upon the back of the policy, as she herself admits, at the request of her husband, and left the policy in his possession. Armed with this evidence of his right to pledge the instrument, he goes upon the money market and does pledge it, first to one person and then to another, and by such pledge raises money and pays his debts. It is not in evidence, and we cannot presume, that the wife ever had any interest in this policy

from having contributed from her separate estate toward the payment of the premiums. * * * But whatever her interest, by indorsing the policy in blank and delivering it to her husband, she clothed him with all the necessary evidence of a power to pledge the instrument by filling up her blank assignment, and we should be opening the door to the grossest frauds if we were to permit the wife, after having done all this, to come forward and claim that her husband had no right to assign the instrument. * * * The husband and the wife are the only parties interested, and they have both participated in the assignment. The law provides no particular mode by which the wife is to manifest her consent, as in the case of a conveyance of lands, and if such an assignment as was made in the present case is not valid, then a policy payable to a married woman is not assignable at all. It is not, however, and cannot be claimed, that a policy payable to a married woman is incapable of assignment within the purview of a court of equity, but it is only claimed that in this case the wife did not consent. She gave, however, to the public the evidence of her consent by indorsing the policy in blank—an act which could be interpreted as done for no other purpose than an assignment, and the same consequences must be attached to this act against her as would follow from such an act performed by any other person. When innocent parties have advanced money to her husband on the faith of such blank indorsements, she cannot be permitted to repudiate the transaction. She cannot be permitted to enable her husband to perpetrate a fraud.”

The indorsement of the policy in blank by the said Susan Westervelt in the case at bar could, therefore, have been interpreted by the public as made for no other purpose than an assignment, and if upon the faith of it the said Mary H. Westervelt and Anna M. Fenner had made the loan which they did to Samuel P. Westervelt, Susan Westervelt would not be permitted to say that such was not the true interpretation of the indorsement. But the blank was filled when the policy was delivered to the said Mary H. Westervelt and Anna M. Fenner; and they supposed, as they had a right to, that the whole was completed and the signature of the assignor affixed at one and the same time. The assignor cannot therefore be allowed to repudiate the transaction on the ground that she indorsed the policy only in blank and that the formal assignment was written by her husband afterwards.

But it is urged that the assignment was void, because by the laws of New York the policy was not assignable; and the cases of Eadie

vs. Slemmon, 26 N. Y., 9; Barry vs. Equitable Life Insurance Company, 59 N. Y., 587, and Wilson vs. Lawrence, 13 Hun (22 N. Y. Sup. Court Rep.), 463, are cited in support of the claim. Two of those cases arose upon policies issued by New York corporations, and the third upon a policy issued by the Connecticut Mutual Life Insurance Company, the petitioner in the case at bar. In two of the cases the assignor and assignee resided and were domiciled in the State of New York, and the assignments were executed and delivered in that State. In the other cases the assignor was a resident of the State of New York, and the assignee was a resident and citizen of the State of Maryland. The assignment was executed on a paper separate from the policy and transmitted to the assignee in Maryland by mail from New York, without the policy. The policy was subsequently delivered to the assignee in the city of New York. The court held that the government of the United States was the agent of the assignee in transmitting the assignment to him from New York to Maryland, and therefore that the assignment, as well as the policy, was delivered to the assignee in the city of New York; and that the contract of assignment was upon that ground to be treated as a New York contract. The policy in the present case is the contract of a Connecticut corporation, and by the terms of it the sum insured is payable in Hartford to Susan Westervelt, the wife of Samuel P. Westervelt, her executors, administrators, or assigns, unless she died before her husband, and to her children in case he survived her. The assignment was commenced in New York, but was completed and, with the policy, was delivered in the State of New Jersey, to citizens of that State. The law of New Jersey, where the assignment was then completed and delivered, or the law of Connecticut, where the contract of insurance is to be performed, must determine the validity of the assignment. There can be no doubt, I think, that the assignment is valid by the laws of Connecticut, as it was made by the wife with the consent and co-operation of her husband, and there is as little doubt that it is valid by the laws of New Jersey. "Every State may by its own laws bind its citizens wherever they may be with all the obligations which its own tribunals can enforce. If laws are made which attempt to go further than that, they must needs be inoperative, as they cannot be enforced beyond the jurisdiction of the home tribunals, except with the consent and by the action of the foreign State." While, therefore, the State of New York had the right to declare that a wife who was a citizen of that State should not assign a policy of insur-

ance upon the life of her husband for her sole benefit, if issued under the laws of New York; and while it had the power to enforce that declaration against its own citizens and others seeking to obtain the benefit of such an assignment in its own tribunals, yet where a citizen of New York, holding such a policy issued by a Connecticut corporation, goes into New Jersey or any other State where the policy is assignable, and obtains a loan of money and assigns his policy as security for the payment of that loan, and then comes into the courts of Connecticut to enforce such payment and his rights under the assignment, the laws of New York will furnish no answer to his demands. The laws of New Jersey where the assignment was completed and delivered, or the laws of Connecticut where the contract is to be performed, must govern. As the laws of the two States coincide it is unnecessary to determine whether those of the former or of the latter State would govern, in case there was a conflict between them.

The conclusion is that a decree be entered authorizing the petitioners to retain from the fund due upon the policy the amount of clerk and court fees, and that they pay from the balance of said fund—1. To Ralph P. Westervelt, one of the respondents, the sum of two hundred, sixty-eight dollars and thirty-eight cents, being the amount paid by him for premiums on the said policy for the years 1877 and 1878, and the interest thereon. 2. To the respondents, Mary H. Westervelt and Anna M. Fenner, the sum of three thousand dollars. 3. To the respondent, Susan Westervelt, the remainder.

THE INSURANCE LAW JOURNAL.

VOL. XV.

FEBRUARY, 1886.

No. 2

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF INDIANA.

Appeal from the Circuit Court.

ERNEST BAUER

vs.

SAMSON LODGE, KNIGHTS OF PYTHIAS.*

A demurrer for want of facts sufficient to constitute a cause of action does not prevent a subsequent plea in abatement.

One who becomes a member of a benevolent order is chargeable with knowledge of its laws, and is bound by them unless illegal or requiring illegal acts, and is therefore bound by the by-laws.

* Decision rendered, June 13, 1885.—Petition for returning overruled, December 18, 1885.

Such organizations may require members to resort to prescribed methods or redressing grievances before invoking the power of the courts, but may not absolutely take away the right of action for money due.

Agreements to submit to arbitration are valid when made after the subject of controversy has arisen, but not when they relate in advance to any controversy that may arise. The party claiming that the power of the court has been curtailed by such agreement must assume the onus probandi, showing a clear agreement.

A custom cannot be invoked to deprive the party having a claim of legal remedies.

A mutual benefit society which for agreed compensation agrees to pay benefits to its members, is not purely a benefit society, but is in respect to contracts to pay benefits, an insurance company.

J. H. STOTSENBURG, and G. H. VOGHT, *for Appellant.*

M. Z. STANNARD, J. G. HOWARD, and J. F. REED, *for Appellee.*

ELLIOTT, J.

The complaint of the appellant alleges that the appellee is a corporation, organized under the laws of Indiana; that it is a subordinate lodge, acting under a charter granted by the Grand Lodge of Knights of Pythias of the State of Indiana; that in accepting the charter the appellee agreed to act in obedience to the enactments of the grand lodge; that Sec. 4, of Art. 5 of the by-laws of the grand lodge is as follows: "Sec. 4. Every knight who has been in fellowship for six months, incapacitated by sickness, or other disability from attending to his usual business or occupation, shall be considered a beneficial member entitled to receive such weekly benefits as the by-laws prescribe: Provided the minimum sum of one dollar per week must be paid through such period of probation: And further provided, that his disability is not brought on by immoral conduct, and that he is in good standing; but any lodge may, by its by-laws, provide that no benefits shall be paid for the first week's sickness or disability."

That the appellee enacted a by-law prescribing that members who had been in fellowship six months when incapacitated by illness should receive five dollars per week as benefits; that appellant has been a member of the defendant lodge in good standing since the first day of March, 1880, and as such entitled to all the rights and benefits of a member; that on the 9th day of March, 1880, he became ill, and was thereby incapacitated from attending to his usual business, and that his illness was not brought on by immoral conduct.

The appellant answered in abatement. The allegations of the plea are substantially these: That the defendant is a subordinate

lodge of the Grand Lodge of the Knights of Pythias of Indiana; that the appellant, when he became a member, pledged himself, by signing a written petition, that he would conform to the constitution, by-laws, and regulations of the defendant; that among the rules and regulations of the supreme lodge of the order, are the following provisions:—

“Article 1. Sec. 1. The supreme lodge is the source of all true and legitimate authority in the order of Knights of Pythias where-soever established. It possesses original and exclusive jurisdiction and power, (1) To establish the order in States, districts, territories, provinces, or countries where the same has not been engrafted. (2) To charter grand lodges and define the territorial extent of their jurisdiction. (3) To hear and determine all appeals from grand and subordinate lodges when the same are properly brought before it, in accordance with the regulations of the order, and to provide by legislation for the enforcement of its decisions.”

“Article 7. Sec. 1. Grand lodges exist by virtue of a charter of dispensation issued by authority of the supreme lodge. They shall conform to the regulations prescribed by the supreme lodge in accordance with this constitution, and shall, subject to the provisions hereof and right of appeal, have exclusive original jurisdictional limits, and over the members attached to the same.”

“Article 7. Sec. 3. Each grand lodge shall adopt a constitution for its own government, and also a constitution for its subordinates, which constitution shall be in accordance with the provisions of this constitution and the laws made in pursuance hereof.”

That more than ten years since the supreme lodge issued a charter to the grand lodge of Indiana, and that grand lodge afterwards chartered the defendant as a subordinate lodge of its jurisdiction; that in the constitution and laws of the grand lodge of Indiana are the following provisions:—

“Sec. 2. This grand lodge shall have jurisdiction over all lodges of Knights of Pythias within the State of Indiana.

“Sec. 3. It possesses the right and power (1) of granting charters, (2) of suspending or taking away the same for proper cause, (3) of receiving and hearing all appeals and of redressing grievances

arising in lodges under its jurisdiction, (4) of enacting by-laws for its government and support: Provided, the same are not in violation of the laws of the supreme lodge."

"Article 5, Sec 8. After the installation of officers, the grand chancellor shall appoint the following committees to serve one year: 1. A committee of appeals and grievances. 2. A committee of law and supervision. 3. A committee of subordinate lodge constitution and by-laws. (4.) A committee on state of order, 5. A committee on finance and accounts. 6. A committee on subordinate lodge returns. 7. A committee on credentials. 8. A committee on mileage and per diem. Each committee shall consist of three members, except the committee on appeal and grievances, which shall consist of five members."

"Article 9. Sec. 4. The committee on appeals and grievances shall hear all appeals and grievances from lodges or members of lodges referred to them by grand lodge or grand chancellor, and report their decisions with the utmost dispatch to the grand lodge or grand chancellor during its recess, but no member of this committee shall serve on any case of appeal from the lodge of which he is a member."

That these provisions of the constitution and by-laws of the order have been in force since the organization of the defendant, and are still in force; that these provisions require a member aggrieved by the decision of a subordinate lodge to appeal first to the grand lodge of the State, and then, if dissatisfied, to the supreme lodge; that according to the usages and customs of the order that have "existed in said order since the time whereof the memory of man knoweth not to the contrary, grievances in the denial of benefits have always been redressed by subordinate lodges or on appeal;" that the plaintiff has not appealed from the decision of the lodge denying him benefits.

Prior to filing this plea, the appellee demurred to the complaint, alleging for cause that it did not state facts sufficient to constitute a cause of action, and it is contended by the appellant that this precludes the appellee from pleading in abatement, and upon this contention arises the first question.

It is important to keep in mind the fact that the plea does not present the question of the jurisdiction of the person of the defend-

ant, but presents the question of the right to maintain the action. The question, therefore, is very different from that which would arise if the defendant had demurred, and then attempted to question the jurisdiction of the court over its person. As a general rule, appearance waives the question of jurisdiction of the person, but here the defendant submits to the jurisdiction and contests the right of the plaintiff to maintain the action. It concedes jurisdiction of the person, but affirms that the action must abate, because the plaintiff has not taken such steps as enabled him to prosecute it.

Appellant's counsel assume that a demurrer is a plea in bar, and proceeding upon this assumption, affirm that the case is within the rule that after pleading in bar the defendant cannot plead in abatement. The validity of this argument depends entirely upon the correctness of the assumption on which it rests. This assumption cannot be made good. Our statute expressly recognizes the difference between demurrers and answers, and the common law quite as fully recognized the difference between pleas and demurrers. In their nature they are essentially different; a demurrer presents an issue of law, while an answer presents an issue of fact. Gould says: "But a demurrer to the declaration is not classed among pleas to the action—not only because it may be taken, as well to any other part of the pleadings, as to the declaration; but also because it neither affirms nor denies any matter of fact, and is, therefore, not regarded as strictly a plea of any class; but rather as an excuse for not pleading." Gould Pleading, Chap. 2, Section 43. Error cannot be successfully assigned upon a ruling denying a motion to strike out part of a complaint.

One who becomes a member of an organization such as the Knights of Pythias, is chargeable with knowledge of its laws and rules, as is bound by them. He cannot be ignorant of them, nor can he refuse obedience to them, unless, indeed, they are illegal or require the performance of acts which the law forbids. *Simeral vs. Dubuque M. F. Ins. Co.*, 18 Iowa, 319; *Coles vs. Iowa State M. Ins. Co.*, 18 Iowa, 425; *Mitchell vs. Lycoming M. Ins. Co.*, 51 Pa. St., 402; *Fugure vs. Mutual Society of St. Joseph*, 46 Vt., 362.

By-laws, not in themselves illegal, and not requiring the performance of acts contrary to law, must, therefore, be deemed binding upon all persons who become members of such an organization as the Knights of Pythias, and the question is as to the existence and effect of the by-laws in this particular case.

There is some conflict of opinion as to the extent to which such

an organization may go in restricting actions for benefits promised its members, some of the cases holding that it may prohibit actions at law altogether and make its own decisions conclusive; others holding that it may not materially restrict the right to sue: *Black, etc. Society vs. Vandike*, 2 Whart., 309; *Osceola Tribe etc. vs. Schmidt*, 57 Md., 98; *Harrington vs. Workingmen's Benev. Ass'n*, 27 Alb. L. J., 438; *Poultney vs. Bachman*, 31 Hun, 49; *Lafond vs. Deems*, 81 N. Y., 507; *Foram vs. Howard Benf. Ass'n*, 4 Pa. St., 519.

The reasonable rule is, that such an organization may provide methods for redressing grievances and deciding controversies, and may compel members to resort to the prescribed method of procedure before invoking the power of the courts, but that it may not entirely prohibit members from seeking to recover benefits accruing to them under the by-laws of the organization. Men voluntarily enter such organizations, and in becoming members subscribe to their laws, and if these laws make provision for trying controversies, the member aggrieved must pursue the course prescribed before resorting to the courts to enforce his claims. There is no valid reason why he should not be compelled to do what he has agreed, and the harmony and efficiency of such organizations require that all measures provided and required by their by-laws should be exhausted before appealing to the courts to settle the controversy. On the other hand, it would be unjust to permit such organizations to take from their members all right of action for money due them. Claims for money due by virtue of an agreement are unlike mere matters of discipline, questions of doctrine, or of policy, and are not governed by the same rules. A corporation which promises to pay a certain sum as benefits during a member's illness, in consideration of his payment of dues, is not a purely benevolent organization; it may be, and doubtless is, benevolent and charitable in a great degree, but it is not a benevolent organization in the sense of dispensing benefits without consideration. The consideration the order receives is the dues paid by the member, and in return it promises him benefits. In speaking of a charter similar to the *Knights of Pythias*, the Supreme Court of Massachusetts said: "The corporation is not a mere charitable society, but is rather in the nature of an association for the mutual insurance of its members against sickness or accident. If it refuses to perform its contract contained in the by-laws, the member who is injured may have recourse to the proper courts to enforce the contract." *Dolan vs. Court of Good*

Samaritan, etc., supra. Our own decisions have recognized a like doctrine as applicable to the life insurance feature of such organizations: Elkhart Mut. Aid etc. Ass'n. vs. Houghton, and Supreme Lodge K. of P. vs. Schmidt, 98 Ind., 374.

It is not within the power of individuals or corporations to create judicial tribunals for the final and conclusive settlements of controversies. In a case in principle the same as the present, it was said: "To create a judicial tribunal is one of the functions of the sovereign power; and although parties may always make such tribunal for themselves, in an specific case, by a submission to arbitration, yet the power is guarded by the most cautious rules. * * It would hardly accord with this scrupulous care to secure fairness in such cases, that parties should be held legally bound by the sort of engagement that exists here, by which the most extensive judicial powers are conferred upon bodies of men whose individual members are subject to continual fluctuation: Austin vs. Searing, 16 N. Y., 112.

It is to be noted that agreements to submit a matter to arbitration are valid when made after the specific controversy has actually arisen, and not when made in advance, certainly not when the agreement provides that one of the interested parties shall be the sole arbitrator. The weight of authority is very decidedly against the power of parties to bind themselves in advance that a controversy that may possibly arise shall be conclusively settled by an individual or a corporation, and to that doctrine this court is committed: Insurance Co. vs. Morse, 20 Wall., 445; Mentz vs. Armenia F. Ins. Co., 79 Pa. St., 478.

As all persons having a money demand against an individual or a corporation have a right to resort to the courts in the first instance, when payment is withheld, to coerce payment, that right must exist unless it clearly appears that it has been abridged or surrendered. In the case before us the answer concedes the right to the benefits claimed, but affirms that an action cannot be maintained because the claimant has not taken the steps which must precede the assertion of the claim in a court of justice. In order that this general right, a right possessed by all citizens, should be curtailed, it must clearly appear that he to whom the money is due, has agreed that it may be abridged. One who asserts a claim to money due upon a contract occupies an essentially different position from one who presents a question of discipline, of policy, or of doctrine of the order or fraternity to which he belongs. All the decisions,

from first to last, recognize a broad distinction between the two classes of cases, and the one before us belongs to the class where property rights are involved, and is a member of a class recognizable by the courts.

The policy of the law, as declared in our constitution and by our decisions, is to freely open the courts to those who seek money due them upon contract, and the party who asserts that the right to invoke the aid of the courts has been curtailed, must show a clear agreement abridging the right. These principles necessarily lead to the conclusion that a corporation which has agreed to pay pecuniary benefits to one of its members cannot successfully resist an appeal to the courts without showing an express or implied agreement that before making such an appeal the members shall pursue a course of procedure prescribed by the laws of the organization.

In the case in judgment there is a clear right to the benefits claimed, for so the by-laws provide, and where there is a right there is a remedy. If there is a remedy, it is the usual one, unless by a legal contract the parties have otherwise agreed; here, the usual remedy, open and free to all citizens having just demand, is an ordinary action at law, and the question narrows to this, has the claimant abridged his remedy by contract? We find nothing in the by-laws which can be deemed a partial or a total surrender of his rights to enforce his contract in the usual method. It is true there is a general right of appeal provided for, but there is no stipulation that the claimant of benefits shall appeal; and, if we are correct in our reasoning, there is no abridgment of his right to pursue the usual remedies. In order to abridge this right there must be a stipulation to that effect. Men do not lose their legal right to enforce their contracts unless they have yielded it up by agreement. The provision that an aggrieved party may appeal is permissive; it does not wrest from him the right conferred upon him by law. If a man has a legal right, and the corporation of which he becomes a member adds another, that of appeal to its superior governing bodies, the added right is merely cumulative, it is not exclusive; positive words only can take away an existing right. Conferring a right to pursue a given course does not destroy an existing right; in order to destroy such a right proper limiting words must be employed. Here, there are no limiting words; there is nothing that limits the general right to sue in the courts, and a right such as this cannot be taken away without a clear agreement surrendering it. If it had been the intention to require members to surrender their

right to sue at once upon the breach of the contract, and to compel them to first appeal to the grand bodies of the order, it would have been easy to so declare; but there is no such declaration, and, therefore, no agreement taking away the right to sue for the enforcement of the contract which the claimant possessed by virtue of the law of the land. The right to sue is one given, as we have seen, by law, and no custom can be good which is contrary to law. A custom that a party having a claim for money due upon contract may not pursue the usual remedies provided by law, is not valid: *Mason vs. Grand Lodge, etc.*, 30 Minn., 509; *Thompson vs. Insurance Co.*, 104 U. S., 252; *Franklin Ins. Co. vs. Humphries*, 65 Ind., 549; *Wallace vs. Morgan*, 23 Ind., 399.

The court below erred in overruling the demurrer to the plea, and the judgment must be reversed.

Petition for rehearing overruled.

SUPREME COURT OF VERMONT.

JANUARY TERM, 1885.

JOHN G. FINDEISEN & WIFE)

vs.

METROPOLE FIRE INS. CO.*)

A waiver is an intentional relinquishment of a known right; thus, when the company's special agent sent to adjust the loss, declared: "That the claim was worthless, and that the loss would not be paid, because he burned the property," but the referee found, that the agent did not intend to waive the proofs of loss, that the plaintiffs did not understand that they were waived, and were not misled as to furnishing such proofs, it was held that there was no waiver.

But, where the property destroyed was owned by a married woman, and her husband signed and swore to the proof of loss as her agent, and on objection by the company to such proof, he offered, if the company would return the proof received, to have it corrected and executed by his wife, and thereupon the defendant refused to return it for amendment, or to specify other defects, it was held that such conduct ought to be accounted a waiver, or an estoppel.

Under the conditions of this policy, and the facts, that the husband procured and paid for the insurance, as his wife's agent, that he as such agent transacted all the business connected with the purchase and management of the property insured, and that his wife had no personal knowledge as to the property, the court think the proof of loss, though executed by such agent, was sufficient.

Assumpsit upon a policy of insurance issued to the plaintiff, Katharina M. Findeisen, wife of said John G. Findeisen. Heard on a referee's report, April term, 1884, Taft, J., presiding. Judgment for the plaintiff.

The defendant's counsel claimed, with other claimed defects in the proof of loss, sufficiently stated in the opinion, that the magistrate's certificate attached to the proof was not in accordance with the conditions of the policy or the printed form of proof. The eighth clause of the conditions was:—

* From advance sheets of the Vermont Report.

"Persons sustaining loss or damage by fire, shall forthwith give notice of said loss to this company, and, as soon thereafter as possible, render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all policies thereon, also the actual cash value of the property and their interest therein, for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used at the time of the loss, when and how the fire originated, and shall also produce a certificate under the hand and seal of a magistrate or notary public (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured), stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured, to the amount which such magistrate or notary public shall certify."

The proof was signed by "John G. Findeisen, Agt.;" and immediately below the signature were the words, "Subscribed and sworn to before me. Cyrus W. Wicker, Justice of the Peace."

Next in order was the following blank certificate:—

"Magistrate's certificate. I, ———, residing in ———, most contiguous to the property hereinbefore described, hereby certify that I am not concerned in the loss or claim above set forth, either as a creditor or otherwise, or related to the insured or sufferers; that I have examined the circumstances attending the fire, or damage as alleged, and that I am well acquainted with the character and circumstances of the assured, and do verily believe that she has by misfortune, and without fraud or evil practice, sustained loss and damage on the property insured to the amount of over three thousand dollars. In testimony whereof, I have hereunto set my hand and official seal this ——— day of ———, A. D. 18—."

The property insured was in a woolen mill which the plaintiffs had rented.

ROBERTS & ROBERTS, *for the Defendant.*

The proof of loss was not in accordance with the conditions of the policy. The signature and oath of the husband as agent are not sufficient.

There were special reasons in this case for requiring the oath of the assured. The fire was "supposed to be incendiary." The

company was entitled to her own declaration and oath that "it did not originate by any act, design, or procurement on her part, nor in consequence of any fraud or evil practice done or suffered by her."* No one could swear to this for her: *Spooner vs. Vt. Mut. Ins. Co.*, 53 Vt., 156; *Walsh vs. Vt. Mut. F. Ins. Co.*, 54 Vt., 351.

The so-called magistrate's certificate fails to conform to the conditions of sec. 8 of the policy, in many respects: (a.) It is the private signature of Cyrus W. Wicker, and not official; (b) it is not under his "seal;" (c) if a magistrate at all, it does not appear that he was nearest to the place of the fire."

Obtaining a proper certificate was a condition precedent to a recovery: *May Ins.*, s. 466; *Worsley vs. Wood*, 6 T. R., 710; 1 *Benn. F. I. Cas.*, 53; *Johnson vs. Phoenix Ins. Co.*, 112 *Mass.*, 49; *Roumage vs. Fire Ins. Co.*, 1 *Green (N. J.)*, 110; *Leadbetter vs. Aetna Ins. Co.*, 13 *Me.*, 265; *Ins. Co. vs. Pherson*, 5 *Ind.*, 417; 3 *Benn. F. I. Cas.*, 753; *Ins. Co. vs. Lawrence*, 3 *Pet.*, 25. None of the defects were waived: *Donahue vs. Ins. Co.*, 56 *Vt.*, 374; *Gauch vs. Peiser*, 10 *Fed. Rep.*, 347; *Goss vs. St. Paul F. & M. Ins. Co.*, 22 *Fed. Rep.*, 74.

Insisting upon the first fundamental defect was not a waiver of other defects to follow. This could not be, since it was stated in the correspondence that there were other defects not intended to be waived.

The company was not bound to specify any defects in the proofs, nor to aid the plaintiff to make out her case, but leave her free to present it in her own way. A refusal to pay even (which there was not in this case), without assigning any reason therefor, is no waiver of such like defects. See cases cited above.

WHITTEMORE & WHEELER and E. R. HARD, *for the Plaintiffs.*

Forfeitures are not favored, and policies are to be construed liberally in respect to the insured: *Mosley vs. Ins. Co.*, 55 *Vt.*, 142. The declarations of Gray excused the plaintiffs from furnishing any preliminary proofs, if he had authority to waive the requirements of the policy in respect to such proof: *Wood Ins.*, 717, 726; *May Ins.*, 468, 503; *Norwich etc. Trans. Co. vs. Ins. Co.*, 34 *Iowa*, 561; *Underhill vs. Ins. Co.*, 6 *Cush.*, 440; *Vos vs. Ins. Co.*, 9 *Johns.*, 192; *Francis vs. Ins. Co.*, 6 *Cow.*, 404; *Taylor vs. Ins. Co.*, 9 *How.*, 390; *Walsh vs. Vt. Mut. F. Ins. Co.*, 54 *Vt.*, 351; *Noyes vs. Ins. Co.*, 30 *Vt.*, 659;

* The quoted words of this sentence were in the proof of loss sworn to by the husband. —REP.

Blake vs. Ins. Co., 12 Gray, 265; 17 N. Y., 428; Ball & Gage Wagon Co. vs. Ins. Co., 13 Ins. L. J., 371; Corneli vs. Ins. Co., 9 Wend., 163. Gray had such authority: Ins. Co. vs. Chicago Ice Co., 36 Md., 102; Wood Ins., 721; May Ins., 126; Taylor vs. Ins. Co., 5 N. H., 50. The court could infer that Gray had authority to waive: Barber vs. Britton, 26 Vt., 113; Abbott vs. Camp, 23 Vt., 650; Bond vs. Clark, 47 Vt., 565. But if it was not a complete waiver of all preliminary proof, the specification of a single objection to the proof furnished, without particular mention of any other, is a waiver of all objections to the proof except the one specified: Wood Ins., 715, 718, 723; May Ins., 468; Blake vs. Ins. Co., 12 Gray, 265; Lewis vs. Ins. Co., 52 Me., 492; Ætna Ins. Co. vs. Tyler, 16 Wend., 385; 1 Benn. F. I. Cas., 576, 590; Taylor vs. Ins. Co., 51 N. H., 50; Walsh vs. Vt. Mut. F. Ins. Co., *supra*; Mosley vs. Vt. Mut. F. Ins. Co., 55 Vt., 142; McMaster vs. Ins. Co., 25 Wend., 370; 13 Am. Rep., 416. Refusal to return the proof was a waiver: May Ins., 469; Turley vs. N. A. F. Ins. Co., 25 Wend., 374; Cornell vs. Ins. Co., 9 Wend., 166. The proof sworn to by her agent was sufficient: May Ins., 463; Wood Ins., 694, 726; Sims vs. Ins. Co., 47 Mo., 54; 4 Am. Rep., 312; Kernochen vs. Ins. Co., 17 N. Y., 428; Barnes vs. Ins. Co., 45 N. H., 21; Ayres vs. Ins. Co., 17 Iowa, 176; Ins. Co. vs. Grayhill, 47 Penn. St., 17; 16 Vt., 653.

Royce, C. J.

This is an action of assumpsit on a policy of fire insurance, and comes up on the report of a referee, upon which the court below rendered a judgment for the plaintiffs.

The defendant relies upon various specified defects in the proof of loss submitted by the assured; and in reply it is insisted, first, that the declarations of Gray, the special agent of the company sent to adjust the loss, which were made to the plaintiff, John G. Findeisen, and were, according to the referee's findings, "that the claim against the company was worthless, and that the loss would not be paid, because he burned the property," amounted to a waiver of the proofs of loss required by the conditions of the policy.

It is established beyond question, that such requirements are for the benefit of the company and may be waived by it; and also that, being conditions of forfeiture, they are not favored by the law, and a waiver of them is often found on slight evidence. Thus, it has been held that an unqualified refusal by the company to pay the loss upon other specified grounds, made before the expiration of the time

within which it was the duty of the assured, by the terms of the policy, to file his proofs of loss, is an act from which the triers may find a waiver of such proofs. See authorities cited in *Lyon vs. Travelers' Ins. Co.*, 31 Alb. L. J., 59; 20 N. W. Rep., 829; and in *Mosley vs. Vt. M. F. I. Co.*, 55 Vt., 142.

But it is equally well settled that a waiver is, as remarked by Taft, J., in *Donahue vs. Windsor County Ins. Co.*, 56 Vt., on page 382, "an intentional relinquishment of a known right;" and that whether or not there has been a waiver is always a question of fact for the jury: *Donahue vs. Ins. Co.*, supra; *Home Ins. Co. vs. Baltimore Warehouse Co.*, 16 Am. Law Reg., 162; *Enterprise Ins. Co. vs. Parisot*, 35 Ohio St., 35, and authorities supra.

In the case at bar, the referee was substituted for the jury as a trier of the facts; and he has found, that the company's agent did not intend to waive the proofs of loss; that Findeisen did not understand that they were waived, and that the plaintiffs were not misled or hindered in the matter of preparing and forwarding the proofs by what was then said by the agent. These findings of fact conclusively negative a waiver at that time; and it does not become necessary to consider the question of the authority of the agent. The right of the triers of fact to find a waiver of proofs of loss from a previous positive denial of liability upon other specified grounds, is based by the authorities upon the ground that from such a refusal the assured may well consider the furnishing of proofs a needless trouble and expense.

The plaintiff, John G. Findeisen, seasonably proceeded to make out and forward to the company a proof of loss, which is made a part of the case, and which he signed and swore to as agent for his wife, who was the owner of the property insured, and who was named in the policy as the person insured. It is claimed by the defendant that this proof of loss was not a compliance with the conditions of the policy; and the first objection made is, that it should have been signed and sworn to by the wife herself; while, on the other hand, the plaintiffs insist that the proofs were properly executed and verified by the husband in his capacity as agent; and further, that by specifically objecting to the proofs when filed, because of their execution by the husband, and declining to return them for execution by the wife, or to specify the other objections now raised, the defendant must be treated as having waived them, or be held estopped to now insist on them.

The policy provides, by the 8th clause of the conditions, that

"persons sustaining loss or damage by fire shall forthwith give notice of such loss to this company, and as soon thereafter as possible, render a particular account of such loss, signed and sworn to by them," and containing the matter by that condition prescribed. There is no more specific provision than this as to the person whose signature and oath are required to the proof of loss; but it is afterwards prescribed that "the assured" shall do certain things with reference to the property, submit to examination if required, etc. It appears that the plaintiff, John G., acting as agent for his wife, transacted all the business connected with the purchase and management of the property insured, the renting of the building in which it was, and the business in which it was used; and that he, as such agent, procured the insurance and paid for it. In the matter of the application, if any were made, and the issuance of the policy, the company then dealt with and treated John G. as the agent and representative of his wife; and received from him in such capacity the consideration upon which the contract rests. The 10th clause of the conditions provides that "it is a part of this contract that any person other than the assured, who may have procured this insurance to be taken by this company shall be deemed to be the agent of the assured"—a condition manifestly inserted for the benefit of the company.

Under the terms of the contract, the facts shown, and the further fact found by the referee that the female plaintiff had no personal knowledge as to the property in the mill at the time of the fire—one of the most important things required to be set forth in the proof of loss—it is difficult to find any sound reason, either in the contract itself or in law, for holding that the signature and oath of John G. Findeisen, as agent for his wife, the person insured, and whose full authority to act in that capacity in respect of all the acts performed by him is not questioned, was not entirely sufficient. Certainly, the company could not have been prejudiced by the fact that the proof was executed by the agent instead of the principal; because objections to the sufficiency of the proof as offered could be specified and insisted upon, together with that one, just as well with his signature and oath upon it as hers; and if the personal testimony of the assured were desired for any reason, as suggested in the brief, it could have been required by the company under the 7th condition, above referred to, and on refusal to submit to such examination a forfeiture of the policy could have been insisted on. We should, therefore, be strongly disposed to hold that the execution of the

proof of loss, in this case, was entirely within the power of an agent, the scope of whose authority from his principal is not in question, and that the maxim, *Qui facit per alium, facit per se*, applies. See authorities cited upon plaintiffs' brief.

But even this is not necessary. It appears from the correspondence attached to the referee's report, that John G. Findeisen, with all reasonable promptness, upon being advised that the company objected to the proof of loss forwarded by him, offered, if they would return the same, to make it satisfactory in all respects wherein the company would specify that it was faulty or insufficient, and have the corrected and amended proof executed by the wife, if the company required that to be done. No satisfactory reason appears for the refusal of the company to comply with this request and offer. If it thought proper to wholly reject the paper forwarded and refuse to consider or treat it as a proof of loss in any sense, we are aware of no principle upon which it could sustain an arbitrary right to retain it as against Findeisen. He could reasonably insist upon its return; and we think the refusal of the company to return it upon request, for the purposes named, Findeisen offering to remedy the only objection to it which was specifically pointed out, and its further refusal to point out the other defects which it purposed insisting upon on request, and in such manner as to give the plaintiffs opportunity to seasonably furnish a proof of loss which should satisfy the company and the requirements of the policy, as they offered to do, ought to be held a waiver by the defendant of the objections now sought to be insisted on, or else to estop the defendant from now urging any of said objections. It was such conduct as might well have had a tendency to prevent the plaintiffs from furnishing a proof of loss to which the company could not have made objection, either on the score of seasonableness, or upon some other ground, technical or substantial.

We come to this conclusion the more readily in view of the fact that there is nothing in the case, as presented, even tending to show that anything complained of by the defendant has prejudiced it in the least; or that any objection suggested to the proof of loss is other than purely technical. We believe the true principle of the law is well stated in *Appleton Iron Co. vs. British American Assurance Co.*, 46 Wis., 23, where the court say: "When a forfeiture of an insurance policy is alleged on merely technical grounds, not going to the risk, the contract of insurance will be upheld, if it can be, without violating any principle of law." The judgment is affirmed.

SUPREME COURT OF INDIANA.

MAY TERM, 1885.

Appeal from the Starke Circuit Court.

**ELKHART MUTUAL AID, BENEVOLENT &
RELIEF ASSOCIATION**

vs.

JAMES E. HOUGHTON.*

The complaint against a benevolent society set forth the issue of a certificate stipulating to pay a certain amount or so much thereof as might be collected by assessment, and that the society refused to make an assessment or to pay the sum.

Held, That a demurrer on the ground of failure to aver that there were members, and to state the number of them who might be assessed, could not be sustained; it is for the company to show if there were not enough members to collect the whole amount, otherwise the claimant is entitled to recover the maximum amount.

An instruction must be considered as a whole, and will not be adjudged erroneous if the evidence might have justified it.

Where a grandfather, residing with his grandson, may have procured a policy on his life in favor of the grandson, himself paying the premiums, it is not error to instruct that in the absence of fraud there was sufficient insurable interest.

ZOLLARS, J.

Appellee's right to recover rests upon two certificates of membership issued by appellant. These certificates are, in legal effect, policies of insurance upon the life of James Mitchell.

So far as concerns any question involved in this case, the rules of

* Decision rendered, October 17, 1885.

law which govern ordinary policies of insurance are applicable here.

Appellee declared upon these certificates and made them a part of his complaint. In each of them, appellee is named as the payee and beneficiary. The portions of each of the certificates, necessary to be set out here, are as follows: "This certifies that James Mitchell has paid ten dollars, the amount required on application, and has covenanted and agreed to pay \$1.50 as an assessment upon the death of any member, or the maturity of any certificate. He is, therefore, and hereby, constituted a member, and entitled to participate in the benefits of the Elkhart Mutual Aid, Benevolent, Relief Association. * * * This certificate entitles James E. Houghton, his heirs or assigns, within ninety days after presentation of satisfactory proof of the death of said member, to one thousand dollars, or so much thereof as may be realized from one assessment, not exceeding one thousand dollars, payable at the home office of said association, in the city of Elkhart.

* * * 7th. "This association will hold no reserved fund, and all losses will be paid from moneys derived from mutual assessments."

The complaint avers the death of James Mitchell, the proof of his death, and the refusal of appellant to pay the amounts named in the certificates or any part thereof, and its refusal to order or make any assessment upon the members of the association to raise the required sum, or any part of it. The complaint is not assailed upon the ground that it shows the invalidity of or fails to show the validity of the certificates as policies of insurance upon the life of James Mitchell, in favor of appellee as beneficiary.

The sole objection urged to the complaint is, that it does not state the number of the members of the association against whom assessments might be made to raise the money with which to pay in full, or in part, the amounts named in the certificates. The contention is, that the complaint does not make a case without the averment that there are such members, and a statement of the number of them. Appellant has not only refused to pay the amounts named in the certificates, but has also refused to make any assessment. So the complaint alleges. Under these averments, admitted to be true by the demurrer, appellee is entitled to a money judgment against appellant. The certificates each provide that upon the death of the assured, appellee is entitled to one thousand dollars, or so much as may be realized from one assessment, etc. The undertaking in each certificate is for one thousand dollars, unless an assessment will not

produce that much. That an assessment would not produce two thousand dollars, we think, is a matter of defense to be set up by appellant. It would be difficult if not impossible, for appellee to know how many members of the association there are. The books of the association doubtless show the number. These books are in the possession and custody of the officers of the association. If the members are such, in number, that an assessment would not produce two thousand dollars, that fact is known to the officers of the association, and they should set it up in an answer, and make good the answer by proof, as they readily could, if true.

This, we think, is the reasonable rule to apply in a case like this, and especially, where, as here, the insurer contests the claim upon other grounds, and utterly refuses either to pay or make an assessment. We are aware that there are authorities against, as well as in support of the rule we here adopt.

The case of *Lenders' Exr. vs. Hartford Life and Annuity Ins. Co.*, 4 McCrary's Rep., 149, supports our view to the full extent, and we content ourselves with a citation of that case, and one case by this court.

Lenders, in his lifetime, held five certificates of insurance, similar to those in suit, which provided that in case of the death of the holder, an assessment should be made upon all other certificate holders, to pay the amounts named in the certificates, and that not to exceed one thousand dollars, the amount named in each certificate, should be paid upon such certificate.

It was contended in that case, that the executor of Lenders should aver and prove the number of outstanding certificates. In answer to this contention, McCrary, J., among other things said: "It is best known to the company who and where are the certificate holders, and, if plaintiff's rights to a judgment on a disputed loss are to be limited by the number of, etc., of outstanding certificates, it would seem that defendant should set up the limit as to the number, etc. lapsed, or otherwise.

* * * * * Despite decisions to the contrary, this court cannot hold otherwise than that, when suit has to be brought, the recovery should be for the maximum insured, unless the defendant shows by pleadings and proof, that said sum should be reduced." See also the *Excelsior Mut. Aid Association of Anderson, etc. vs. Reddle*, 91 Ind., 84.

Our holding that the complaint makes a case for a recovery of the full amount of the certificates, until something is pleaded and proven

to reduce that amount, disposes of appellant's contention that the judgment for \$2,000 is too large.

It is not beyond the complaint, and we cannot say that it is too large upon the evidence, because the evidence is not before us. The only other alleged error argued by counsel is, the giving of the fifth instruction by the court below. It is as follows: "Much has been said about an insurable interest in the life of another. Upon this question, and as a matter of law I instruct you that a grandson with whom a grandfather resides, has an insurable interest in the life of the grandfather; and a policy of insurance taken out by the grandfather in favor of the grandson, in the absence of fraud, is valid and binding on the company issuing it."

It is well settled that a single instruction must be considered as a whole, and is not to be dissected and overthrown, because an isolated part, when thus wrenched from its proper connections, may seem to be erroneous: *McDermott vs. the State*, 89-186.

It is well settled also, that where the evidence is not in the record, the judgment will not be reversed on account of an instruction, if, upon any state of the evidence which might properly have been before the jury, the instruction would have been correct. In such a case it will be presumed that the instruction was applicable to the evidence: *Keating vs. the State, ex rel. Homan*, 44 Ind., 449; *Northwestern Mut. Life Ins. Co. vs. Herman*, 93 Ind., 24; *Dennerline et al. vs. Gabel et al.*, 73 Ind., 210; *Stratton vs. Kennard et al.*, 74 Ind., 302; *Drinkout vs. Eagle Machine Works*, 90 Ind., 423; *Wade vs. Gappinger et al.*, 60 Ind., 376; *Higbe et ux. vs. Moore*, 66 Ind., 263; *Powers vs. the State*, 87 Ind., 144.

The fair interpretation of the instruction complained of, taken as a whole, and the one a jury would be most likely to put upon it is, we think, that if a grandfather procures an insurance upon his life in favor of a grandson, with whom he lives, the grandson will have such an insurable interest in the life of the grandfather, as that the policy will not be invalid in the absence of fraud, and, as applied to this case that the grandson may maintain an action upon the policy. Thus interpreted, the instruction clearly does not enunciate an erroneous proposition of law. And in the state of the record, it must be presumed that it was applicable to the evidence. The evidence may have been that the grandfather, James Mitchell, procured the policies of insurance, paid the premiums, and in good faith, and for cause, had them made payable to the grandson, appellee, as the beneficiary. And so, the grandfather may have been indebted to

appellee. In the case of the Provident Life Ins. and Investment Co. vs. Baum, 29 Ind., 236, one brother insured his life in favor of another. In one paragraph of the complaint it was averred that the brother was made the beneficiary, in consideration of love and affection. No interest of a pecuniary nature was shown. The court also charged the jury that it was wholly immaterial under the evidence in the case, whether the beneficiary had, or had not, any interest of a pecuniary nature in the life of the assured. This court in holding the instruction to be correct and the complaint good, said: "The position assumed by appellant in argument, that this policy is one of indemnity, and that the appellee must show an interest in the life of the assured, does not, we think, arise in this case.

The policy in terms declares that the company insure Americus Baum against loss of life in the sum of three thousand dollars. It cannot be questioned that a person has an insurable interest in his own life, and that he may affect such insurance, and appoint any one to receive the money in case of his death during the existence of such policy. It is not for the insurance company after executing such a contract, and agreeing to the appointment so made, to question the right of such appointee to maintain the action. If there should be any controversy as to the distribution among the heirs of the deceased, of the sum so contracted to be paid, it does not concern the insurers. The appellant contracted with the insured to pay the money to the appellee, and upon such payment being made, it will be discharged from all responsibility. So far as the insurance company is interested, the contract is effective as an appointment of the appellee to receive the sum insured."

The learned counsel for appellant thinks that this case is, in principle, overthrown by the case of the Franklin Life Ins. Co. vs. Hazzard, 41 Ind., 116. We do not think so. In that case, Hazzard, for a nominal consideration, had the policy upon the life of one Cone assigned to him, and took the assignment as a mere matter of speculation. Upon this ground the assignment was condemned, as being opposed to public policy. The learned judge who wrote the opinion in that case also wrote the opinion in the latter case of the Franklin Life Ins. Co. vs. Sefton, Adm'r, et al., 53 Ind., 308, in which the case of Provident Life Ins. and Investment Co. vs. Baum, *supra*, was quoted from and approved.

It was further said: "Doubtless, also, a person may take a policy upon his own life, and by the terms of the policy appoint a person to receive the money in case of his death during the existence of the

policy." The case of *Provident Life and Investment Co. vs. Baum*, supra, was again approved in the late case of the *Continental Life Ins. Co. vs. Volgar*, 89 Ind., 572, and distinguished from a case where a person, for his own benefit, procures a policy upon the life of another and pays the premium. And it was held that in such a case the payee and beneficiary must aver in his complaint his insurable interest in the life of the assured, and that such averments need not be made by the beneficiary in a case where a person has procured a policy upon his own life and appointed another, and had him named in the policy as the beneficiary. In support of this distinction, the case of *Guardian Mutual Life Ins. Co. vs. Hogan*, 80 Ill., 35, is cited. Mr. Bliss in his work on insurance, at section 26, says: "A person has undoubtedly an insurable interest in his own life, and that interest supports a policy whether he makes the loss payable to himself, his executors, or his assigns, or to a nominee or appointee named in the policy. Nor is a policy obtained by one on his own life for the benefit of another, which latter advances the premiums, necessarily void.

The question is whether the policy was in fact intended to be what it purports to be, or whether the form was adopted as a cover for a mere wager. If the plaintiff and the insured confederated together to procure a policy for the plaintiff's benefit, when he is not, and does not expect to be a creditor of the insured, and with a view of having the policy assigned to him without consideration, the policy is void."

In the case of *Campbell vs. New England Mut. Life Ins. Co.*, 98 Mass., 381, Campbell obtained a policy of insurance upon his life for the use of a brother's wife. Want of interest in the beneficiary was the ground of defense. Upon this point the court said: "The policy in this case is upon the life of Andrew Campbell. It was made upon his application; it issued to him as the assured; the premium was paid by him; and he thereby became a member of the defendant corporation. It is the interest of Andrew Campbell in his own life that supports the policy. The plaintiff did not by virtue of the clause declaring the policy to be for her benefit, become the assured. * * * It was not necessary, therefore, that the plaintiff should show that she had an interest in the life of Andrew Campbell, by which the policy could be supported, as a policy to herself as the assured. This case is approved in *Stevens vs. Warren*, 101 Mass., 564, where it is further observed that if it should appear that the arrangement was a cover for speculating risk, contravening

the general policy of the law, it would not be sustained. The same doctrine is announced in the case of *Olmstead vs. Keyes*, 85 N. Y., 597, after a review of the authorities. See also *Fairchild vs. North Eastern Mut. Life Association*, 51 Vt., 613; *Clark vs. Allen*, 11 R. I., 439; *Loomis vs. Eagle L. & H. Ins. Co.*, 6 Gray, 399; *Lemon vs. Phoenix Ins. Co.*, 38 Conn., 294.

In the case of *Conn. Mut. Life Ins. Co. vs. Schaeffer*, 94 U. S., 457, it was said: "A man cannot take out an insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some interest to him. It is well settled that a man has an insurable interest in his own life, and in that of his wife and children; a woman in the life of her husband, and the creditor in the life of his debtor. Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. And there is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend."

Again in the case of *Ætna Life Ins. Co. vs. France*, is the same value at page 561, where a policy was upon the life of a person expressly for the benefit of his sister, the same court said: "We concur in the construction of the policy made by the court below, and in the validity of the transaction as held by us as in the case of the *Connecticut Mutual Life Insurance Company vs. Schaeffer*, supra, p. 457, any person has a right to procure an insurance on his own life, and assign it to another, provided it be not done by way of a cover for a wager policy; and where the relationship between the parties as in this case, is such as to constitute a good and valid consideration in law for any gift or grant, the transaction is entirely free from any such imputation. The direction of payment in the policy itself is equivalent to such assignment."

These authorities are abundantly sufficient to show that the instruction under examination in this case as applicable to the evidence as it might, and may have been under the issues is not erroneous.

Judgment affirmed with costs.

SUPREME COURT OF PENNSYLVANIA.

Error to the Court of Common Pleas of Lehigh County.

LEBANON MUTUAL INSURANCE COMPANY

vs.

LOSCH.*

The plaintiff in his application for insurance answered "No" to an interrogatory, which was, "If encumbered, how and to what amount." At that time there was a mortgage upon a part of the insured premises. This mortgage was subsequently removed, and a new mortgage, covering the entire premises, placed thereon, with the consent of the insurance company, for the approval of which they were paid. The policy did not in terms make the application a part of the policy, it stated "this policy is made and accepted in reference to the conditions hereto annexed, as well as the application and survey, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for.

Held, That the answer in the application did not avoid the policy.

This policy also contained the following condition: "If, during the insurance, any alteration be made on the premises, buildings erected, or changes made in the use or occupation of the same or neighboring premises, or otherwise, whereby the risk or hazard is increased, so as to increase the rate of insurance, it shall be the duty of the insured to give notice thereof to the secretary, pay the additional premium, and obtain the consent of the company thereto in writing, otherwise the insured shall not be entitled to recover for any loss or damage by fire originating in consequence of such change." A tenant of the insured erected a frame building about fifty feet from the buildings of the assured. *Held*, That this did not avoid the policy.

MESSRS. BUTZ & SCHWARTZ, for Plaintiff in Error.

EDWARD HARVEY, Esq., for Defendant in Error.

PAXSON, J.

Upon the argument at bar the defendant company set up two distinct grounds of defense, viz: 1. A breach warranty as to incumbrances; and, 2. The erection by the plaintiff below of an additional

* Decision rendered, March 23, 1885.—From *Legal Intelligence*.

building near the one insured, by which the risk was increased so as to increase the rate of insurance, of which erection no notice had been given to the company. It appeared on the trial below, that in the plaintiff's application for insurance he answered "No" to the eleventh interrogatory, which was: "If encumbered, how, and to what amount?" In point of fact, at the time the policy was issued, there was a mortgage upon a part of the insured premises. This mortgage was subsequently removed, and a new mortgage, covering the entire premises, placed thereon with the consent of the defendant company, and for the approval of which they were paid. This condition of things continued for several years, and until the fire occurred by which the insured premises were destroyed.

There is nothing to commend this branch of the case to our favorable consideration. An examination of the record shows that it was little relied upon in the trial below, if relied upon at all. No point was put to the court as to the effect of the original mortgage upon the contract of insurance. The alleged warranty was contained in the application; the policy did not in terms make the application a part of the policy. The only clause in the policy which could possibly bear this interpretation is the following: "And this policy is made and accepted in reference to the conditions hereto annexed, as well as the application and survey, which are to be used and resorted to, in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for." No point was put to the court as to the effect of this clause. The court was not asked to say, that it made the application a part of the policy, and thereby incorporated the warranty against incumbrance into the contract of insurance. The court did say in its general charge: "I have already said to you, where the defendant undertakes to say that the answer to a certain question in this paper amounts to a warranty, and that warranty does not appear in the body of the policy itself, you are to treat the answers in the application simply as representations, and there can only be a defeat in case the jury find that those representations were falsely made." This was assigned for error, and it is the only assignment which has any possible relation to the matter of the mortgage, or the alleged warranty. All of the other assignments, and all the points put to the court below by the defendant company, relate to the question of the increase of risk, which was the ground upon which the company refused to pay, and upon which they attempted to defeat a recovery in the court below.

Under the circumstances we are not prepared to reverse the case upon the above extract from the charge. It is not inaccurate as an abstract proposition. If the defendant company desired a more specific instruction, they should have asked for it. Moreover, I am unable to see its importance or relevancy to this case. Conceding that the mortgage existed when the application was made and policy issued, and that the warranty against incumbrances was made a part of the policy, the company are estopped from setting it up to defeat a recovery, for the reason that they subsequently gave their assent to the incumbrance, and were paid for it. And this occurred years before the fire. The palpable injustice of such a defense may be the reason why it is so dimly shadowed forth upon this record.

It remains to consider the second branch of the defense. In one of the printed "conditions of insurance" I find the following: "If, during the insurance, any alteration be made on the premises, buildings erected, or change made in the use or occupation of the same or neighboring premises, or otherwise, whereby the risk or hazard increased, so as to increase the rate of insurance, it shall be the duty of the insured to give notice thereof to the secretary, pay the additional premium, and obtain the consent of the company thereto in writing, otherwise the insured shall not be entitled to recover for any loss or damage by fire originating in consequence of such change."

No change occurred on the premises insured. There was a change in the surroundings, made after the date of the policy. The insured erected a shop within about twenty feet of the insured premises, for which he obtained the consent of the company and paid an additional premium. He also demised a lot of ground adjoining the premises to a tenant, who erected thereon a frame building, which he used as a carriage factory. This building was about fifty feet from the premises insured. No notice of its erection was given to the company, nor was any additional premium paid.

Had the condition of insurance required the insured to give notice to the company of any change in the surroundings, it would have been his duty to give notice of the erection of the carriage factory. Such, however, was not the condition. The notice was only required in case the change was such as to increase the risk or hazard, "so as to increase the rate of insurance." Under this clause it is manifest that the insured must be shown to have knowledge that the building would not only increase the risk, but that it would also enhance the

rate of insurance. The conditions of the policy must be construed most strongly against the company. We are not to assume, when the plaintiff below seeks to recover on his policies for what, at least, appears to be an honest loss, that he knew the factory building would increase the risk to such an extent as to increase the rate of insurance. There was nothing upon the face of his policy, or in the conditions attached, had he read carefully every word of both, which could have given him this information. It was a fact, the solution of which must be found outside this policy. There was not a word of evidence to show that the insured knew that the carriage factory would increase the risk to the extent specified in the policy, nor indeed to any extent. There was evidence that the risk was increased, but not that the rates of insurance would be increased thereby. It must be remembered that the factory was about fifty feet away from the insured premises, and the plaintiff may well have thought there was no material increase of the risk. And it is not clear, from the defendant's own testimony, that the risk was materially increased. Lewis P. Hecker, a witness on behalf of the company, says, in answer to the inquiry whether there was an increase of risk: "Not very much, I should think; the risk was increased a little; it was an additional exposure in the hazardous business carried on; the exposure was great; the risk and hazard, so far as fire was concerned, was increased." Israel Reber, another witness, says: "In my opinion, it would be rather more risky." And John H. Helfrick, agent for defendant company, in response to a similar inquiry, answers in this cautious manner: "I would rather think it would (increase the risk); because two hazardous buildings make it more dangerous than one; that is natural.

The building insured was a livery stable, a hazardous risk, for which a high premium was paid. It was to this circumstance the last witness referred when he spoke of two hazardous buildings.

What has been said practically disposes of the assignments of error. I will say, however, in addition, that the defendant's first, second, and third points assume all the facts, as to some of which there was no evidence, and the court below committed no error in rejecting them. The defendant's fourth and eighth points were also properly refused. Conceding that the fire originated in the carriage factory, that fact would not necessarily defeat the plaintiff's right to recover. Such right depended upon other matters not involved in these points. The defendant's fifth point was not pressed below nor here, and need not be discussed. There is nothing in it.

The remaining assignments relate to the exclusion of evidence offered on the part of the defendant company to show that the erection of the carriage factory would increase the rate of insurance. Most, if not all, of these offers were rejected, upon the ground that the witness, by whom the proof was proposed to be made, had not the information necessary for the purpose. The ruling was unquestionably right as to most of the cases, and we need not discuss the others, for the reason that there was no attempt to show that the insured knew that the circumstances were such that he ought to have known that the erection of the carriage factory would so materially enhance the risk as to increase the rate of insurance.

Judgment affirmed.

SUPREME COURT OF TEXAS.

Appeal from Marion County.

QUEEN INSURANCE CO.

vs.

JEFFERSON ICE CO.*

An insurance company doing business in this State, which consummates a contract of insurance here, and which is contemplated to be executed here, is held to have elected to do business under the terms of our laws and must be governed by them. Under article 2,971 Revised Statutes, therefore, the stipulation in the insurance policy that in case of total loss by fire of real property insured, the insured will bear one-fourth of the loss is void, and the policy evidences a liquidated demand against the insurer for its full amount. This provision does not apply to personal property.

Where the policy provides that the loss should be paid within sixty days after proof of loss, interest should be computed from the expiration of that time, and not from the date of loss.

The policy sued on, in terms, only extended or attached to such personal property as was owned by the insured, there being no insurance on property on storage. Plaintiff pleaded that the property destroyed belonged to it. Defendant pleaded a general denial. *Held*: This put the question of ownership in issue, and proof that the property destroyed did not belong to plaintiff was admissible.

Statement.

This suit was brought by appellee against appellant on a fire insurance policy issued by the latter. The petition alleged, in substance, that on October 8, 1884, it was the owner of certain lots in Jefferson, together with the building thereon situated, and an ice machine, with all its attachments and apparatus, situated in said building; that it had on storage a lot of beer in kegs; that the

* Decision rendered, October 30, 1886.—From *Texas Law Review*.

building was worth \$1,500, the beer in kegs \$600, and the ice machine, with its attachments, \$7,499.25; that on said date the appellee procured insurance with the appellant, and the Fire Association of Philadelphia, and the American Fire Insurance Company, through Beard & Claiborne, the common agents of said three companies; that appellant issued a policy of insurance to appellee on said property as follows: \$500 on the building, \$1,833 on the engine and boiler, \$666.75 on condenser, freezing tank and the fixtures, pumps and tools; \$200 on their beer in kegs, making a total insurance of appellant on the property of \$3,199.75; that said property was insured for the same amounts, and in the same way, in the two policies issued by the other two companies herein referred to; that in all of said policies there was a mistake mutual to both appellant and appellee, in the preparation of said policies, in this, that it was not the intention of the parties, in the preparation of said policies, to place separate insurance on the several items of property covered by the policy, but to take in the aggregate the amount of insurance specified in the policy, on the whole of the property, without reference to the separate values of the several parts of the property; that on October 29, 1884, the property covered by the policy of appellant was totally destroyed by fire; that the building, at the time of the fire, was of the value of \$1,500, and the beer in kegs was of the value of \$600, and the ice machine was of the value of \$8,997; that the boiler and engine, taken separately, were of the value of \$3,000, the condenser, tank, fixtures, and tools were of the value of \$4,977.

Appellee prayed that the policy of insurance sued upon be reformed, so as to express the true contract of the parties, and the appellee have judgment for the full amount of the policy.

Appellant answered by general demurrer, general denial, and various special exceptions and pleas, all of which were overruled save that which set up that there was an appraisal and arbitration between the parties. There was a verdict and judgment for appellee for \$2,076.85, from which this appeal is prosecuted.

BENNETT & MILLER, *for Appellant.*

C. A. CULBERSON, *for Appellee.*

STAYTON, J.

The policy sued upon in this case covered property personal and real, the different items of property covered by the policy, as well as the amount of insurance on each, being stated. The policy provided,

in the event of loss, the insured should bear one-fourth of the loss, and that in the event of other insurance, which could be made only with the consent of the insurer, the company should only be liable for its proportion of three-fourths of the cash market value at the time of the fire. There was insurance of \$500 on a house under the policy issued by the defendant, and additional insurance on the same property by other companies, with its consent, which amounted to \$1,000. The house was entirely destroyed by fire, and was not shown to exceed \$1,500 in value.

Under these facts the court was asked by the defendant to give the following instruction, which was refused: "The jury are instructed that if they believe, from the evidence, that the building of plaintiff was insured by defendant for \$500, and that there was \$1,000 of concurrent insurance, and that the policy provides that in the event of loss the assured should bear one-fourth of the loss of the value of said property, then if you find that said building has been wholly destroyed, and its value was \$1,500, the defendant is liable for only one-third of three-fourths of said amount of \$1,500."

The statute provides that: "A fire insurance policy, in case of a total loss by fire of property insured, shall be held and considered to be a liquidated demand against the company for the full amount of such policy; provided, that the provisions of this article shall not apply to personal property." Rev. Stats., art. 2,971.

The defendant is a foreign corporation, permitted under certain restrictions to do an insurance business in this State: Rev. Stats., art. 2,949 et seq. The contract of insurance was consummated here; it was contemplated that it should be executed here, and we are of the opinion that it must be governed by the laws of this State. The defendant, having elected to do business here under the terms of the statute, must be held to have assented as to such business, to be governed by the laws of this State, and to have its contracts evidenced by the policies here made complete, and here to be enforced and construed as would be a like contract made by a home company: *Thwing vs. Ins. Co.*, 111 Mass., 93; *Heeburn vs. Ins. Co.*, 10 Gray, 131; *Fletcher vs. Ins. Co.*, 13 Fed. Rep., 528; *Cox vs. U. S.*, 6 Peters, 202; *Wood on Fire Ins.*, sec. 93.

The language of the statute referred to is clear, and its purpose evidently was to make all policies on real property, in case of total loss, valued policies without reference to stipulation contained in them which would give them a different character but for the statute, which becomes a part of every such contract. By force of the

statute, when the loss is total, the policy evidences a liquidated demand against the company issuing it, for its full amount.

That insurance may have been subsequently obtained, with the consent of the defendant, in other companies, on the same property, does not affect the liability of the defendant to pay the full amount named in the policy as the indemnity. The several policies on the house give full indemnity to the insured, if the house was not of value greater than \$1,500, but this furnishes no reason for denying to the plaintiff the indemnity contracted for.

If, in order to induce good faith and care on the part of the insured, and thus give greater security to the insurer, it was thought that the property to some extent should be at the risk of the insured, such protection could have been secured to the defendant by its refusal to permit other insurance to be made on the property, as by the terms of the policy it had the power to do.

In so far as the policy covered personal property, its provisions, as to the share of the loss to be suffered by the insured, as to contributions by all companies that issued policies on the same property, and other like things, are to be given full force.

The petition alleged that the engine and boiler were of the value of \$3,000, and it is claimed that the court erred in not instructing the jury that they could not find them to be of greater value at the time they were destroyed. It is a sufficient answer to this assignment to say that if the charge was thought to be defective in this respect, a charge such as was thought proper should have been requested. It is, however, not denied that there was evidence from which the jury might have found that the engine and boiler were of the value of \$3,000. The verdict and judgment in this respect was only for \$701.56, which is a less sum than the defendant would have been liable for under the terms of the policy had the jury found the engine and boiler to be of the value of \$3,000, hence no injury could have resulted to the defendant from the supposed defect in the charge of the court.

The policy provided that the loss should be paid within sixty days after proof of loss was furnished, but the court instructed the jury to give interest from the date of the loss, and this they did. The contract of insurance is one from which indemnity against loss is intended to be secured, but the parties to such a contract may by it determine what the indemnity shall be, and in the absence of some law controlling the matter, effect must be given to their contract. They did contract in such manner that the sum to be paid may be

ascertained, and they fixed a time at which it should be paid, and interest prior to the date when payment of the same found to be due under the policy, by its terms, should be paid, constitutes no part of the indemnity for which they contracted: *Moins vs. Ins. Co.*, 3 *Bennett's Fire Ins. Cases*, 383; *Swancot Machine Co. vs. Partridge*, 3 *Fire Ins. Cases*, 481; *McLaughlin vs. Ins. Co.*, 3 *Fire Ins. Cases*, 19; *Delonguermase vs. Ins. Co.*, 1 *Fire Ins. Cases*, 315.

The policy gave insurance of \$200 on "their beer in kegs," and contained a provision that the insurer should not be liable for more than the value of the interest of the insured in the property, and further that it would not be liable for property "held on storage, unless separately and specifically insured as such." The policy also contained the usual provision that it should be void "if any person shall now or hereafter have any interest therein, or if the assured shall not be the sole and unconditional owner in fee of said property." The petition alleged that the property destroyed belonged to the plaintiff, and, with other defenses, the defendant pleaded a general denial. On the trial the defendant proposed to prove that the beer destroyed was not the property of the plaintiff. The evidence was objected to on the ground that there was no pleading to justify the admission of such evidence, and the objection was sustained.

It is a general rule that an insurer desiring to defeat a policy by showing fraud, misrepresentation, or other facts existing at the time of its issuance, or afterward, should plead such fact as is relied on, but no such case is here presented.

The policy sued on, in terms, only extended, or attached, to such beer as was owned by the insured, there being no insurance on beer held on storage, and recognizing that fact the plaintiff pleaded that the beer and other property destroyed belonged to it, and we are of the opinion that the general denial put that fact in issue, and the evidence should have been received, for, if the beer did not belong to the plaintiff, the policy did not cover it, however valid the policy may be.

For the errors mentioned, the judgment of the court below will be reversed and the cause remanded.

Reversed and remanded.

Robertson, J., did not sit in this case.

SUPREME COURT OF PENNSYLVANIA.

Error to the Court of Common Pleas of Mercer County.

AMERICAN FIRE INS. CO.)

vs.)

W. B. HAZEN & SON.*)

What is a reasonable time for furnishing proofs, is ordinarily a question of law for the court when the facts are ascertained, but where they are in dispute, it is for the jury under proper instructions.

If the plaintiff was physically unable sooner to comply with the requirements of the company, proofs would be in time if prepared as soon thereafter as he was able.

Plaintiff's general good character is not a legitimate subject of proof in a civil suit on a policy, although the defendant in its plea may charge a crime to relieve itself of liability.

Messrs. MASON & MASON, *for Plaintiff in Error.*

Messrs. STEWART A. COCHRAN and STRANAHAN & BOWSER, *Contra.*

CLARK, J.

This action of debt is brought by W. B. Hazen & Son upon a policy of the American Fire Insurance Company to recover damages for the loss by fire of the Pine Riffle Flouring Mills in Mercer County. The insurance was effected 1st June, 1882, for one year, in the sum of one thousand dollars, as follows: "\$200 on the mill building; \$75 on boiler and engine; \$175 on purifier and bolts, and \$500 on burrs, shafting, belts, husks, water wheel, and all other machinery used in the manufacture of flour, feed, and meal, and

* Opinion filed, November 9, 1885.

contained in the said mill building and boiler house." The fire occurred 16th February, 1883, and the loss was total, the entire building with its contents having been consumed in the conflagration.

It is provided in the policy, that in the event of a loss by fire, the insured shall forthwith give notice thereof in writing to the company, "and as soon thereafter as possible render a particular account by separate items, and proof thereof signed and sworn to by the assured," setting forth certain matters specifically mentioned. The damages are payable sixty days after the loss shall have been ascertained and satisfactory proof thereof made to the company in accordance with the terms of the policy. The notice, it is conceded, was given as required, but it is contended that the preliminary proofs were not furnished "as soon thereafter as possible."

The fire, as we have said, occurred 16th February, 1883, and proofs were furnished to the company some time prior to the 10th May, 1883, but they are alleged to have been defective. A second and more full and formal proof was made 30th August, 1883, but was not submitted to the company until 15th October thereafter; this was also disapproved as defective in several particulars, and notice to that effect was communicated to the plaintiffs; when produced and offered in evidence, however, the latter proof was adjudged sufficient, both in form and substance, and we do not understand that any exception has been taken to this ruling of the court.

Whether this proof was furnished in a reasonable time, or as soon after the casualty occurred as was reasonably possible, is therefore the first question presented. What is a reasonable time, when the facts are ascertained, is ordinarily a question of law for the court, to be determined upon a consideration of all the circumstances; where, however, the facts are not clearly established, or where the question is dependent upon other controverted matters it is, under proper instructions, for the jury: *Hickman vs. Shimp*, 33 Pittsburgh Legal Journal, 82. In the case at bar, it is alleged on part of the plaintiffs, that W. B. Hazen was at the time of the fire, and for a long time afterwards, in a very feeble condition of health, physically and mentally; that two of his sons had died in that spring and that he was himself seriously sick, having been for two or three months confined to his bed; that his memory was very much affected, and that from February to August, 1883, he was totally unfit and did not pretend to do any business whatever; that he was

obliged to submit himself to a surgical operation, and that as soon as he was sufficiently recovered, he gave the matter his attention and made the proofs dated 30th August, 1883. Mr. Cochran, who was his attorney and prepared the proofs, testifies that he was unable on account of the illness of Mr. Hazen to communicate with him; that Mr. Hazen could give him very little, if any aid, and that it was with the greatest difficulty that he was able to obtain the information requisite to comply with the requirements of the company. The forms for proof, it would appear, provided for an estimate of the value of the building by the builders, and of the machinery by the millwrights, and Mr. Cochran states in detail the efforts which were from time to time made to complete the proofs on this plan; that for a long time he failed to find the millwrights who had constructed the machinery; that in the mean time he procured an estimate of others unacquainted with it, and that from these the proofs of 30th August, 1883, were made; that subsequently, however, he learned the names and whereabouts of the millwrights who built the machinery, and in order to know with certainty that the estimates were correct, he held the proofs for their inspection and examination of those who had personal, actual knowledge of the nature and value of the subject of loss. He says that he exercised reasonable diligence in the matters committed to his charge and forwarded the proofs as soon as he could. These facts, it is true, were seriously controverted, but with the weight and conflict of the evidence and the veracity of the witnesses we have nothing to do.

The company demanded that W. B. Hazen should join in the proofs, the preparation of which, under the requirements of the company, involved a considerable degree of detail and exactness of statement. If he was in fact mentally and physically unfit so to do; if as soon as he was sufficiently restored he set about the business of preparation; if his attorney advanced the work as rapidly as he could under the circumstances, if there was not upon the part of either any neglect or want of due diligence, until the time the final proof was furnished, the delay which ensued could not bar the plaintiff's recovery. In this determination of the question, therefore, as to what was a reasonable time, under the circumstances, it was for the court to apply the law, and to submit the facts to the jury, and this, we think, was done.

The rules of the Court of Common Pleas of Mercer County require that the defendant, in a certain class of cases at least, must, in

an affidavit to be filed in response to the plaintiff's affidavit of claim, allege all the matters of defense upon which he relies, and provides, in effect, that he will not be permitted at the trial to set up any matter, not thus specified in his affidavit. The rule referred to has not been printed, but its existence is nowhere denied. The affidavit filed is not before us, but it appears to be conceded that it contained no averment as to incumbrances entered against the property, or that any defense would be taken upon that ground. If the rule of court is as stated the offer of the judgment of Emma Seidle against W. B. Hazen was rightly refused for any other purpose than that for which it was admitted. For the same reason, and others which might be stated, the record of the action of the Susquehanna Mutual Fire Insurance Company against W. B. Hazen was also admissible.

Upon the seventh assignment, however, we think this judgment must be reversed. The evidence as to the plaintiff's general reputation as an honest, peaceable and orderly man may perhaps have had little effect in the determination of the cause by the jury, but it was received against the objection of the defendant, an exception was noted, and it is assigned for error here. It seems to be well settled in Pennsylvania that in civil cases evidence of general character is not admissible, unless from the nature of the action, character is directly drawn in issue, as in libel or slander and seduction. Putting character in issue, as was said in *Porter vs. Seiler*, 11 Harris, 424, is a technical expression which does not signify merely that personal reputation is incidentally involved in the consequences or results of the action, but that the action in its nature directly involves the question of character.

In *Nash vs. Gilheson*, 5 S. & R., 352, evidence of the defendant's good character was rejected, although actual fraud was imputed to him, on the evidence of the plaintiff; and in *Anderson vs. Long*, 10 S. & R., 55, the plaintiff was refused permission to show good character, although the defendant set up his fraud by way of defense. In *Porter vs. Seiler*, 11 Harris, 424, an action of trespass was brought to recover damages for an injury willfully inflicted with a knife, and evidence of the defendant's general good character as a peaceable man was excluded when offered for the purpose of rebutting malice. So in *Zetzer vs. Merkel*, 12 Harris, 408, it was held that evidence of the defendant's good character was inadmissible in an action on the case for seduction.

In *Porter vs. Seiler*, *supra*, the authorities are carefully collected,

and the whole subject elaborately considered, and we deem it unnecessary on that account, to enter into any extended discussion of the question here. The rule may be considered as settled under our decisions that in civil suits evidence of character is not admissible except where it is directly in issue and where from the nature of the issue such evidence is of special importance; whether the act charged or complained of be indictable or not is not material. Here the company set up by way of defense that the plaintiffs or some of them willfully caused the fire which occasioned the loss, and, although a verdict in favor of the company on that ground might affect the character of the plaintiffs, yet their character was in no proper sense put in issue.

The plaintiffs' good reputation for honesty, peace, and good order would undoubtedly have been the legitimate subject of proof in their favor, upon the trial of an indictment, but it will not avail them in the trial of an action in enforcement of the contract of insurance, even though the defendants, by their plea, may charge upon them the perpetration of the same crime, to relieve themselves from liability.

The judgment is reversed and venire facias de novo awarded.

SUPREME COURT OF LOUISIANA.

Appeal from the Civil District Court, Parish of Orleans.

BENJAMIN S. STORY

vs.

HOPE INS. CO.*

In an action on a policy of insurance, the act of the insurer who has knowledge of an increase of risk by a change of use of the insured premises without objecting to the same or canceling the policy, will be construed as a waiver of his right of forfeiture of the contract by reason of such increase of risk.

Parol testimony is admissible to show such waiver although the policy contained a clause requiring the agreement of the insurer to be indorsed on the policy.

If the insurer, after knowledge of the increase of risk, continues to receive premiums he will be held to have waived the forfeiture.

Positive testimony on a given point must predominate over negative testimony on the same point.

MILLER & FINNEY, *for Plaintiff and Appellee.*

HENRY DENIS, *for Defendant and Appellant.*

PER CURIAM.

This is an action on a policy of insurance of five thousand dollars on a building which was destroyed by fire on the 11th of May, 1882.

The defense is a violation by the insured of an express condition of the policy prohibiting an increase of risk by the insured without the express consent in writing of the company.

Defendant appeals from a judgment in favor of plaintiff.

The policy was issued in 1875, and was renewed annually for seven years.

When the insurance began, the building was used as a warehouse for the storing of sugar, molasses, moss, and other non-hazardous articles. In November, 1877, under a change of tenants, the building was occupied and used as a broom factory, which was operated by steam appliances with the consent of the insured.

It is not disputed that this change increased the risk, and that under the rules of the company it called for a higher rate of insurance. The record shows that the rate was not increased, but annual payments of premiums were made and received under the same terms as contained in the original policy.

Plaintiff's contention is that the change was effected with the knowledge and consent of the insurer, who is thus estopped from invoking the forfeiture of the contract on account of the alleged violation of an important condition of the same. That condition stipulated, among other acts of forfeiture, the use or occupation of the insured premises in a manner so as to increase the risk, without the indorsement on the policy of the company's written consent thereto.

The policy also contained the following clause, which had reference to the condition just mentioned :—

"The use of general terms or any less than a distinct, specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein."

Relying on these stipulations, defendant resisted the introduction of parol testimony in support of its alleged knowledge of, or consent to the increase of risk resulting from the altered use of the insured building, and a bill of exceptions has been reserved from an adverse ruling.

1st. The first and main contention in the case involves, therefore, the proposition that, under the conditions of the policy in suit, parol evidence is inadmissible to prove any declarations or acts of the company which may be construed as a waiving of the conditions alleged to have been violated by the insured as operating the forfeiture of his right of recovery under the policy.

The jurisprudence of several of our sister States of the Union has established the rule that the party for whose benefit a condition has been stipulated in a written contract can be successfully met

with parol testimony to show that he has waived such condition, and the rule has been uniformly applied and invariably enforced in contracts of insurance in which the waiver may be shown by express verbal agreement, or implied from acts which are inconsistent with an intention to cancel the policy on account of the violation of any essential condition of the contract : Wood on Fire Insurance, sec. 368, 371-496.

All the authorities which we have examined with the case which the importance of the discussion imports, and several of which are quoted in another part of this opinion, have very correctly sanctioned the conclusion that receiving the premium on a policy by the insurer after knowledge of the increase of risk, is one of the most unsurmountable obstacles in his attempt to invoke the forfeiture of the contract on the ground of such an increase of risk. The contrary doctrine under which the insurer who would be notified of a change of use or occupation of the insured premises would be allowed to continue to receive the annual premiums for five consecutive years as in the case in hand, and in the event of loss to escape responsibility for a failure to have indorsed his consent in the policy would be glaringly inequitable and clearly monstrous.

The equitable rule is that any one is at liberty to waive any condition, stipulation, or right which may exist in his favor. And in contracts of insurance the practical effect of the rule has been interpreted to mean that the insurer who obtains knowledge of a broken condition must express his assent or dissent, and that his silence means assent. It is too plain for discussion that silent assent must of necessity be proved by parol testimony. The reason of this ruling does not antagonize the general principle which excludes parol evidence to contradict or alter a written instrument. The effect of the testimony is not to deny the existence or contradict the true meaning of the written instrument, but simply to show acts of the party to or benefited thereby, manifesting his intention to abandon or waive such benefit. Among numerous authorities which have recognized this doctrine, we refer to the following, which are more directly in point: 26 Iowa, 9; *Viele vs. Germania Insurance Co.*, 62 Illinois, 458; *Reaper City Ins. Co. vs. Sorey*, 65 New York, 6; *Pitney vs. Glens Falls Ins. Co.*, 65 New York, 195; *Peshner vs. Phenix Insurance Co.*, 4 Hun, N. Y., 413; *Van Allen vs. Farmers' Ins. Co.*, 5 Hun, N. Y., 90; *Hotchkiss vs. Germania Ins. Co.*

Defendant's able counsel concedes that the current of authority in our sister States is in the sense in which we have indicated, but he

contends that the issue must be tested exclusively under the provisions of our civil code, which ignores the common-law distinctions between deeds under seal or not, which distinctions he asserts underlie the reasoning in the cases quoted from the State of New York, and he invokes in a plausible argument the effect of the clause which we herein transcribed from the policy in the first part of this opinion as being the law which the parties have made unto themselves. The proposition that contracts of insurance must of necessity abide the special provisions of our local law is, in our opinion, unsound. Wisdom as well as sound public policy strongly suggests that questions involved in such contracts find a better solution in commercial law, and that therefore this court cannot without being recreant to its plain duty, attempt to resist the effect of the harmonious authorities of our sister States dealing with a subject which does not admit of State or territorial limits in its vast importance. But when tested under our own laws the argument does not gain any strength.

The restriction in art. 2,276 of our code reads: "Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before or at the time of making them or since."

We fail to perceive anything in this prohibition which militates against the rule which we herein enforce.

In allowing parol proof of the acts of the party in whose favor a condition has been stipulated in a written instrument, we see no effort to admit such evidence against or beyond the contents of the contract or of what may have been said before, at the time, or since, as making part of the contract, we merely open the door to parol proof of acts equivalent in law to a subsequent agreement to maintain the vitality of a written contract, which in the absence of such agreement or consent would have terminated in the option of the innocent party by reason of prohibited acts on the part of the defaulting party.

In the recent case of *Janney vs. Brown*, 36 An., 118, we had occasion to consider the effect of such testimony in connection with that article of the code, and we there held that a party to a written contract with another as common carriers would be allowed to show by parol evidence a subsequent agreement conferring on him certain privileges as managing partner, for the reason that the subsequent verbal agreement referred to a matter which formed no part of the written contract.

Similar rulings are found in our reports, 7 Robinson, 520 ; Cunningham vs. Caldwell, 10 Rev., 94 ; 3 An., 492.

Our construction of the clause so strenuously invoked by defendant as making law unto the parties is that it is at most a condition, and that as such it can be waived by the party in whose favor it was stipulated.

A similar clause figured in the policy dealt with in the case above quoted from the 62d Illinois, and the rule was nevertheless enforced.

2d. Having concluded to admit parol testimony in support of the alleged waiver of the company, we have now to consider the sufficiency of the evidence in the record. From the fact that plaintiff's agent swears that he made the change with the consent of the president of the company, and that the latter solemnly swears that he gave no consent; that under the rules of his company he could not give such consent without an increased rate taken in connection with the avowal on both sides that both witnesses are equally creditable, the analysis of that testimony has not been free of difficulty.

But one witness swears affirmatively and the other negatively. The assertion of a fact which has never had existence cannot be consistent with truth, whereas the denial of a fact which has existence may, without violating truth, be the result of inattention or of a defective memory.

Hence the rule that positive testimony on a given point must always predominate over negative testimony on the same point : 33 An., 796; Emsnord vs. Bird.

But in addition to that consideration in studying the testimony of the president of the company is practically uncontradicted, and that it makes full proof of the alleged knowledge of the risk in the proper office of the company. That knowledge, followed by the company's receipts of the premiums during five subsequent and consecutive years affords one of the strongest cases of a clear waiver of the forfeiture of plaintiff's right of recovery under his policy, and that waiver justifies the judgment appealed from.

Judgment affirmed.

COURT OF APPEALS OF NEW YORK.

SAMUEL BARON, *Respondent*,

vs.

AARON BRUMMER ET AL., *Appellants*.

B. took out a policy on his life payable to his wife, on which he had paid \$5,896 in premiums and on which one H. had paid \$357 in premiums at the request of B., of which sum \$1,338 was in excess of \$500 yearly.

Held, That the policy was not assignable and the wife could not be compelled to assign it to a receiver in the suit of one who had recovered a judgment against B. and his wife, nor could the court appropriate the avails as if it had been assignable for the recovery of a debt of B.

Held, That neither the policy nor the proceeds, until it becomes payable, can be reached by a creditor.

Held, That the absence of children does not affect the case.

Held, That the lien of a creditor attaches only to the excess of premiums paid, not to the amount insured.

Held, That the payment of premium in each year constituted a new contract, and subsequent amendatory statutes as to the amount of exemption, relate only to the remedy, and are therefore valid.

Held, That any claim for excess of premiums must be governed by the statutory amount exempted at the time of contracting the debt.

MILLER, J.

This action is in the nature of a creditor's bill, brought by the plaintiff for the purpose of charging a policy of insurance taken out in favor of the defendant, Peane Brummer, the wife of defendant, Aaron Brummer, upon his life, with the payment of a judgment recovered by plaintiff against said defendants.

The policy was issued on the 12th of May, 1868, and was payable on the 12th of May, 1883, or sooner if the husband should die in the mean time.

It was proved on the trial, that there had been paid, in premiums, on the policy the aggregate sum of \$5,896.97, which the court found was paid by defendant, Aaron Brummer, out of his funds and prop-

erty. It also appeared and was found, that \$357.40 was paid by defendant Joseph Herzfeld, at the request of Peane Brummer. There was also a finding by the court to the effect that there was paid on said policy in excess of \$500, in each year the sum of \$1.-338.60. The court also found as conclusion of law, that the policy was assignable, and that the plaintiff had a lien upon the same, and directed that a receiver be appointed, and that the defendants Aaron and Peane Brummer, assign the policy to the receiver. Exceptions were taken to various rulings of the court upon the trial, and the defendants, Aaron and Peane Brummer, appealed to the general term of the supreme court, where the judgment was affirmed, and an appeal was taken to this court.

In order to obtain the moneys arising from the policy, it must be assigned by the defendants or by operation of the decree appointing the receiver and directing the assignment.

The current of authorities has been uniform in favor of the position that policies of this character are not assignable: *Eadie vs. Slimmon*, 26 N. Y., 10; *Barry vs. Equitable Life*, 59 N. Y., 594; *Barry vs. Brune*, 71 N. Y., 262; *Wilson vs. Lawrence*, 76 N. Y., 585; *Brummer vs. Cohn*, 86 N. Y., 11.

In *Brummer vs. Cohn* (*supra*), an action was brought by the plaintiff to set aside an assignment of this identical policy, and it was held that it was not assignable, save in the cases where assignments are authorized by statute.

Under that decision, this policy was not the subject of assignment by Mrs. Brummer, and such being the case it is very clear that the court could not by decree compel her to assign what has been determined in this court, to be unassignable, or by operation of the law appropriate the avails of the policy the same as if it had been assigned for the payment of the debt of the assignor.

There is no force in the position that this policy is a chose in action as to creditors, and can be reached by the appointment of a receiver in proceedings for that purpose. The law of 1840 (Chap. 80), exempts policies of insurance on the life of the husband, for the benefit of the wife, from the claims of the representatives of the husband or any of his creditors, except where the amount of premium paid exceeded a certain sum per annum, and this provision was followed subsequently by amendments of a kindred character, which established a settled policy of the legislature to relieve life insurance policies in certain cases from the payment of the debts of creditors. Under these various provisions, it was the intention of the legislature,

as settled and determined by the courts in the cases already cited, that such policies should not be subjected to the lien of creditors, either of the husband or the wife; as to the former, by the express words of the statute, and as to the latter, by the determination of the courts, and there is no ground for claiming that either the policy or the proceeds which might arise from the same before such payment is made, are subject to be reached in advance by a creditor, or that the policy can be assigned and held by the decree of a court of equity for the benefit of creditors, until it becomes due and payable.

The question whether after the money has been paid, and the avails invested in other property, which could be so reached, is not now presented. Whether it could be thus appropriated, can have no effect upon the determination of the question now before us. The rights of the parties as they now exist, are the subject of consideration, and not any changed condition which may arise in the future.

The fact that the judgment is against both husband and wife, does not affect the question arising, as to the rights of the wife, nor are they changed because she has no children. The statute makes no exception which has in view any special change of circumstances, and it must be held to apply generally in all cases. The act of 1879 (Chap. 248), which authorizes the wife to assign the policy with the consent in writing of the husband, can have no effect upon the exemption because the judgment is against both the husband and wife. It has no application where there has been no assignment with the consent of the husband.

It is insisted by the respondent's counsel, that the amount of the premiums paid upon this policy, forbids that it be regarded as against the plaintiff, as issued under the act of 1840, and the amendments thereof, and reliance is placed upon the provisions of chapter 187, laws of 1858, as amended by chapter 656, of the laws of 1866, amending the act of 1840, which provides that the sum insured in the case of a policy taken out under the statute, shall be applied to the use of the widow free from the claim of a representative of the husband or any of his creditors, but that such exemption shall not apply where the amount of premium annually paid out of the funds or property of the husband shall exceed \$300, and on the subsequent statute (Chap. 277, Laws of 1870), by which the limit of the premium is increased to \$500, and it provided that the exemption shall not apply to so much of the premiums paid in any one year as shall be in excess of \$500.

These provisions together will not bear the construction contended

for. The effect of the act of 1870, was that the policy was to be exempted from creditors, or from any person claiming under the holder unless the amount of annual premium exceeded the sum of \$500, and where the amount paid out of the fund or property of the husband was over \$500, the lien of the creditor might attach to the excess of premium so paid. Beyond this, no lien or claim could exist in favor of creditors and no action could be maintained for the purpose of reaching any portion of the amount insured.

Although the policy was taken out in 1868, yet the debt of the plaintiff was contracted in 1876, as the law stood at that time. The payment of the premium in each year, constituted a new contract. The statutes which relate to the subject, and which amend the original act, are mere enabling laws, and relate only to the remedy. They are therefore constitutional and valid so far as they affect the obligations of the contract.

The claim of the plaintiff that he is entitled to any excess for annual premiums paid over \$300, or of any other amount, is not well supported. As we have seen by the act of 1870, the excess on which the creditor may obtain a lien must be over \$500, and as the debt was contracted in 1876, and no excess over \$500 annually was paid after that period, no claim is established by the plaintiff on account thereof.

There is another ground which interferes with the right of the plaintiff to enforce his lien as to the excess of premium paid annually over \$500. There was no proof to show that any of the premiums were paid by the husband. The only proof on the subject is the introduction on the trial of the statement of the insurance company, showing the amount of premiums paid in cash on account of the policy. It does not appear that any of these were paid by the husband, and the finding of the court that the premiums were paid by the defendant Aaron Brummer out of his funds and property, is without sufficient evidence to support it. To this finding a proper exception was taken.

As the evidence stood, we think the court erred in denying the motion of the defendant's counsel to dismiss the complaint.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur.

SUPREME COURT OF IOWA.

Appeal from Decatur District Court.

CORNETT

28.

PHENIX INS. CO.*

The policy insured a horse against fire or lighting. The insured notified the agent of the loss, but declined to state the cause, claiming that the agent who procured the insurance had assured him that the policy would cover a loss from any cause.

Held, That a reply by the agent that the policy insured only against fire and lightning, and that the company was not liable, was not a waiver of proofs.

Held, That a refusal of the adjuster to examine the loss on the ground that it was not caused by lightning when no claim to the contrary had been made, was not a waiver of proofs.

In the absence of such waiver suit must be brought within the time specified in the policy.

Action upon a policy of insurance against loss by lightning. The policy covered two horses, and while the same was in force one of the horses died, and the plaintiff alleges in his petition that it was killed by lightning. The defendant denied that it was killed by lightning, and denied that the plaintiff furnished the defendant with any proof of loss, and averred that the action was not brought within the time limited in the policy. There was a trial to a jury, and verdict and judgment were rendered for the plaintiff. The defendant appeals.

E. W. CURRY, MCINTIRE BROS., and R. W. BARGER, *for Appellant*,
Phenix Ins. Co.

YOUNG A. PARISH, *for Appellee*, N. Cornett.

* Opinion filed, December 8, 1885.

ADAMS, J.

1. It is not expressly shown that the policy required that notice and proof of loss should be furnished within any given time, or at all. It is, to be sure, shown that a copy of the policy was attached to the plaintiff's petition, but such copy is not set out in the abstract, and we should be wholly in the dark as to whether it contained any requirement respecting notice and proof of loss had not the court instructed the jury upon this point. The court instructed the jury to the effect that the burden was upon the plaintiff to prove that he served notice and proof of loss within sixty days from the loss, unless the same were waived. No question is made as to the correctness of this instruction if there was any evidence of waiver, and one of the principal questions discussed by counsel is as to whether there was any such evidence. The defendant assigns as error the giving of the instruction upon the ground that there was no evidence upon which to base it, and assigns as error the admission of evidence designed to show waiver upon the ground that it did not have that effect. We come, then, to consider whether the evidence introduced to show waiver had any such tendency. In our opinion it had not.

The evidence relied upon consists of a certain letter written to the plaintiff by one Burch, the general agent of the company, and statements made by one Albright, the adjuster of the company. It is said that by the letter and statements the defendant repudiated its liability, and thereby waived proofs of loss. The letter written by Burch was in reply to a letter written him by the plaintiff, in which the plaintiff said: "Your agent represented to me when he took my note and application that if one of my horses died I would get pay for it. One of my horses mentioned in my policy died Thursday night last, and I wrote you for the necessary blanks to make my proof. I have applied to the resident agent here, Mr. Curry, and he does not seem to fully understand the policy as I do." This letter contains no intimation that the horse was killed by lightning. The plaintiff based his claim upon the mere fact that the horse had died, and prefaced his claim by a statement that the company's agent told him that he would be paid if one of his horses died. Any fair construction of the language shows that the plaintiff designed it to be understood as claiming that the agent's statement was such that he was entitled to be paid for his horse, even if it died by disease or by accident otherwise than being killed by lightning. Not only is this the fair import of the letter, but it is shown by undisputed evidence that he did not understand at that

time that his horse had been killed by lightning. On this point, we have the testimony of Curry, the agent, to whom the plaintiff applied after the loss. Curry testified as follows: "He told me that he had a horse die that was insured in the Phenix. I asked him what was the cause of death. He said it did not make any difference what the horse died with, as the agent who took the application said that if a horse died from any cause he would get pay for it. I told him the company insured only against loss by fire or lightning. He did not claim that the horse had been struck by lightning." The plaintiff himself testified as follows: "In that conversation with Curry he said to me: 'What is the matter with your horse?' I says, 'I cannot tell you.' He said, 'You do not expect to get anything for your horse unless he was killed by lightning, do you?' I told him what the agent told me, that I would get pay for the horse, no difference what he died with."

It was while the plaintiff was ignorant of the cause of the death of the horse, and while he thought that he could recover on the agent's statement, whatever might be the cause of the death of the horse, that he wrote the letter to Burch. But we do not need to read the letter in the light of these circumstances. It shows upon its face that the plaintiff's claim was not based upon the fact that the horse had been killed by lightning. It shows more; it shows that he did not see the way clear to recover strictly under the provisions of the policy, and was setting up a claim upon the statement of the agent. That Burch so understood, there is no doubt whatever. His reply is as follows:—

DEAR SIR: Yours of the 12th is at hand reporting the death of one of your horses and telling us that the agent gave you to understand that said horse was insured by our policy against death by disease or accident. We have only to refer you to our policy which you hold, and which is the contract between yourself and the Phenix Ins. Co., and if that policy provides for any other loss but that occasioned by fire or lightning, we will weaken. Our policy is so clear on that point that any other statement used by agents is of no consequence. We can hardly understand how an agent would dare to make such a statement to a sane man. We are not liable for loss of horse."

If we read this letter as a whole, and especially in connection with the one to which it is a reply, it is abundantly evident that the company had no intention of repudiating its liability if the horse was killed by lightning. The claim repudiated was one which the plaintiff had seen fit to set up outside of the provisions of the policy.

Burch's letter did not contain an intimation that the company would refuse to pay if the plaintiff could make proof showing that his loss occurred within the provision of the policy. The letter, then, was not a waiver of proof; it was rather a call for proof. A refusal to pay does not constitute a waiver of proof unless it is of such kind and is made under such circumstances as to justify the inference that proof would be unavailing. In this case proof that the horse was killed by lightning would have tended directly to remove the only objection which had been suggested by the company.

But the plaintiff claims that there was other evidence of waiver. He relies upon what the company's agent said to one Fry. The latter, it appears, was acting for the plaintiff in the matter of this loss. The adjuster went to see him and asked what he knew about the horse being killed by lightning. What information, if any, Fry gave him does not appear. But the result was that the adjuster declined to go and see the plaintiff; saying that he lived eight or nine miles away, and that he had information that the horse was not killed by lightning. It does not appear that up to this time there had been any pretense that the horse had been killed by lightning, and certainly without such pretense there was no reason why the adjuster should go to see him. But in no view did his statement constitute a refusal to pay. We see, then, no evidence of waiver of proof, and the jury should not have been instructed upon the theory that there was.

2. The policy provides that no action on the policy should be sustainable unless brought within six month after the loss. The action does not appear to have been brought within such time. It is claimed, however, that under the statute (Miller's Code, p. 299) the time was extended. Whether the statute has, under the circumstances, any application to such a case as this, we do not determine. It has, we think, no application where proof of loss is neither made nor waived within the time limited, and as we find no making or waiver of proof within such time, the defendant's additional position that the claim is barred appears to be well taken. *Reversed.*

UNITED STATES CIRCUIT COURT.

NORTHERN DISTRICT OF ILLINOIS.

BRYANT AND OTHERS

vs.

CHARTER OAK LIFE INS. CO.*

B. borrowed \$19,000 from I., and gave his bond for that amount, and secured it by mortgage on certain real estate in Chicago. The mortgage provided that B. should keep the property insured against fire and assign the policies as collateral security, which was done. The mortgage provided that in case of loss the mortgagee and his assigns might collect the policies and apply the money in payment of the loan. B. subsequently conveyed the property, in consideration of love and affection, to his children, reserving a life estate therein to himself. I. sold and assigned the bond and mortgage to C., and the bond became due and remained unpaid until the buildings were destroyed by fire. C. collected \$8,875 on the policies and gave B. credit on his bond for that amount. Subsequently, at his request, B. was allowed to renew the mortgage for five years, and to receive and expend the amount collected on the policies, less the interest due on the bond, in restoring the burned buildings.

Held, That the money paid to C. did not extinguish the mortgage pro tanto; that the agreement between B., as life tenant, and C. was valid; and that C. was entitled to foreclose the mortgage on default in payment thereof.

HUGH L. MASON, *for Complainant*.

CYRUS BENTLEY, *for Defendant*.

In Chancery.

GRESHAM, J.

James M. Bryant borrowed \$19,000 from E. S. Isham, on the seventeenth day of May, 1866, and on the same day gave his bond for that amount, and, to secure its payment, executed a mortgage upon real estate in Chicago. It was made the duty of the mortgagor, by a provision in the mortgage, to keep the premises insured against fire, and assign the policies to the mortgagee as collateral security. Policies were obtained and assigned in pursuance of this covenant.

* Decision rendered, July 9, 1885.—From *Federal Reporter*.

The mortgage also provided that the mortgagee, and his assigns might collect the policies in case of loss, and apply the money in payment of the mortgage debt. On the twenty-eighth of August following, Bryant, in consideration of love and affection, by a quit-claim deed conveyed the mortgaged premises to his children, reserving a life estate to himself. This deed contained the following :

And it is hereby understood and agreed that the said party of the first part reserves the right and the power to charge each, any, and all of said lots or parcels of land by mortgages or trust deeds, conveying the fee-simple title thereof, for moneys raised, or to be raised, loaned, or borrowed thereon, for the purposes of improving or adding to the house or houses now upon any one or more or all of said parcels of lands or lots, or erecting upon any one or more or all of said lots, any new building or buildings, whenever, in his opinion, the same may be necessary or proper, by reason of injury or destruction of any house or houses now on said lots, or any of them, by fire or other casualty, or ordinary wear and tear from use, occupation, or time. Said improvements, if made, being for the benefit of those entitled, or to be hereafter entitled, to said lots, and it being right and proper to charge the whole estate in fee-simple with the moneys to be raised for such improvements. And it is further understood, provided, and agreed that no person or persons who make a loan or loans upon such mortgages or trust deeds shall be required to look to the application of such moneys.

It is distinctly understood that said party of the first part reserves to himself a life interest in the property hereby conveyed.

On the twenty-fourth of January, 1867, Isham sold and assigned the bond and mortgage to the defendant. The bond became due on the seventeenth day of May, 1871, and remained wholly unpaid until the ninth day of October of the same year, when the insured buildings were destroyed by the great Chicago fire. On the twenty-first of November following, the defendant collected \$8,875 on the policies, and on its books gave the mortgagor credit for that amount, but made no indorsement of this credit on the bond or mortgage. On the second day of June, 1878, the mortgagor made application to the defendant for a renewal of the mortgage for five years, and asked that he be permitted to receive and expend the insurance money in restoring the destroyed buildings. The defendant agreed to this on the tenth of the same month, and on the faith of this agreement the mortgagor proceeded to rebuild. After the mortgagor had expended between eight and ten thousand dollars under the agreement, the defendant, on the thirtieth of September following, delivered to him the amount collected on the policies, less the interest which had accrued and remained unpaid on the bond

The exact amount the mortgagor thus received under the old mortgage, and without executing a new one, was \$7,880.09.

It is insisted by the complainants that the money paid to the defendant amounted to an extinguishment pro tanto of the mortgage; and that the mortgagor, as life tenant, could not mortgage the fee. It is not denied that the insurance money was expended in good faith, in restoring the destroyed buildings. As life tenant the mortgagor was entitled to possession of the premises, and the rents and profits, and no one could interfere with his possession, so long as he committed no waste. He was bound to keep down the interest, but he was not bound to pay off incumbrances. Although the evidence is not clear on that point, it may be assumed that the mortgagor had the buildings insured before he executed the deed to his children. No right was secured to them in the deed, or otherwise, to share in the benefit of the insurance. The mortgagor's covenant to keep the buildings insured for the benefit of the mortgagee was his personal obligation to the latter. While the policies were held by the mortgagee as collateral security to the mortgage debt, they were also intended to indemnify both the mortgagee and the mortgagor. It does not follow that, because the defendant, as the owner of the bond and mortgage, was authorized to collect the insurance money, and apply it as a payment on the debt, that the underwriters might not have paid the loss to the mortgagor, with the mortgagee's consent. If payment had been thus made, the children could not have complained. In using the insurance money to rebuild, and thus restore the impaired security, no injury resulted to the estate. This money was placed to the mortgagor's credit on the defendant's books without being indorsed as a credit on the bond; it stood for the destroyed building, and as such was collateral security for the debt, just as the policies were before the destruction of the property. It was therefore competent for the defendant and the mortgagor to dispose of this money as they saw fit. The mortgagor did not choose to direct the defendant to apply it as a payment on the mortgage debt: *Gordon vs. Ware Savings Bank*, 115 Mass., 588. The right asserted by the children as remainder men is unfounded, both in law and equity. It follows from this view of the case that without reference to the terms of the deed from the mortgagor to his children, the defendant, the Charter Oak Company, is entitled to a decree on its cross-bill for the amount of the bond and interest, less the credit already made on the interest, and a decree of foreclosure.

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF MISSOURI.

RILEY

vs.

HARTFORD LIFE & ANNUITY INS. CO.*)

Where a life insurance policy provides that it shall be void in case the assured die by "self-destruction, felonious or otherwise," the proviso includes all cases of voluntary self-destruction, sane or insane.

At Law.

Suit upon certificates of membership issued by defendant, insuring the life of George M. Riley. The answer states, among other things, that the "certificates sued on herein were issued by the defendant, and accepted by George M. Riley upon the following express condition and agreement, made between the said assured and the defendant, and constituting part of said certificates, to wit: That if said member should die by 'self-destruction, felonious or otherwise,' then, and in such cases, the said certificates should be null and void and have no effect, and no person should be entitled to damages or the recovery of any money paid thereon;" and that the assured "came to his death from self-destruction, in this: that the said assured died from the immediate effect of a pistol fired by his own hand, such shot having been so fired by the assured with the intention of taking his own life." Replication that the assured committed suicide while insane.

A jury having been sworn to try the issues in said cause, plaintiff first offered in evidence the petition of the plaintiff for divorce, which was filed January 19, 1884.

Mr. Krum, counsel for the defendant, objected on the ground that

* Decision rendered, October 14, 1885.—From *Federal Reporter*.

there is no denial in the replication that the shot was fired by the deceased with the intention on his part of taking his own life. "In other words," said he, "there is nothing in this replication to place this case upon the theory of an accidental destruction of his life by his own act. The plaintiff concedes that the death of her husband, the assured, was caused by the act of the assured himself. It was conceded that the death did not result by reason of any accident to which the assured was exposed. He took his life himself. He fired the shot intentionally, according to the averment of the answer, and with the intention of taking his own life. That fact is not denied, and I submit, in the light of all the authorities upon this question, the defendant is entitled to a verdict upon the pleadings, and that it is not competent to go into any inquiry at all as to the condition of the mind of the assured at the time when he committed the act of which this defendant complains."

TREAT, J. (orally). Ordinarily, of course, felony implies an intent. That is involved in all this class of inquiries; but your proposition is broader — "feloniously or otherwise." Whether that is broad enough to exclude all these considerations, I will not pass upon to-night.

The court thereupon adjourned until October 15, 1885.

On October 15, 1885, the court met pursuant to adjournment, and the following opinion was delivered:—

GEORGE M. STEWART, *for Plaintiff*.

CHESTER H. KRUM, *for Defendant*.

TREAT, J. (orally). After we adjourned last evening I took time to examine the proposition raised by the counsel for the defendant in this cause. The proposition in its more convenient form could have been presented by a demurrer to the replication, and thereby have saved time and unnecessary delay.

Mr. KRUM. My excuse for not doing so, your honor will remember, was because I have been so hurried with other matters in this court that I did not have time to present the question in the form of a demurrer.

The COURT. The proposition now comes up after the jury is impaneled on the presentation of the first item of testimony offered

in this case. Whether that should be admitted or rejected depends on the determination of the court with respect to the true construction of the policy submitted. I have examined these cases to which counsel have referred. They are not new to me, because the original Terry case (*Insurance Co. vs. Terry*, 15 Wall., 580) went from this circuit court, and the case of *Bigelow*, decided in the United States Supreme Court, 93 U. S., 284, remains unchanged, and the case of *Broughton*, 109 U. S., 121, s. c. 3 Sup. Ct. Rep., 99, and the case of *Lathrop* in 111 U. S., 612, s. c. 4 Sup. Ct. Rep., 533, do not vary the rule; for the policies in both those cases were like the original Terry case. But where parties insert in the contract "that if the death is caused by the assured, sane or insane," then there can be no recovery, if he committed the fatal act otherwise than accidentally. Of course, if it is accidental, it was not his act. The next question presented here is whether the use of the terms "feloniously or otherwise" are equivalent to the terms "sane or insane." As suggested last night, the word "feloniously" ordinarily implies an intent, which might lead the court to inquire whether the party was capable of having an intent within the meaning of the law, which would leave this case as in the Terry and other like cases. The supreme court in the case of *Bigelow* decided that the use of this phrase "feloniously or otherwise" was equivalent to the words "sane or insane," so that if the assured caused his own death, that was the end of the right of recovery; consequently this court has to rule out all testimony looking to the condition of the mind of the assured when he committed the fatal act. All testimony relating to that will have to be ruled out, though there is an immaterial issue on that point.

The court regrets that all these matters were not disposed of by a demurrer to the petition, but for reasons of his own the counsel prefers this mode, which is a lawful mode. The result of it is, under the pleadings as they stand before the court, the assured, George M. Riley shot himself, and death followed. That ends the case. If he did so, no beneficiary under the policy can recover. This policy is different from a great many others where other questions are open. He chose to take out a policy in a mutual society whereby, if he killed himself, "sane or insane," no matter under what circumstances, and he chose to kill himself, no recovery could be had under the policy.

SUPREME COURT OF CALIFORNIA.

ENOS
 vs.
 SUN INS. CO.*

Where an insurance company, in its contract with the insured, expressly exempts itself from being bound by "any act or statement" not contained in the written application for the policy, or indorsed on the policy, notice to its agent as to anything different from what the policy and application contained, will not bind the company.

The local agent of the company cannot waive any of the provisions of the policy, except by written indorsement made on the policy or on the application, when the policy provides that anything less than a distinct, specific agreement, indorsed or attached to the policy, shall not be construed as a waiver of any condition or provision of the policy.

In determining whether a fishing scow was, in the policy of insurance, included in the word "building," and thereby affected by all the terms and conditions of the policy as a building, evidence that similar scows, as well as the one in question, were used and occupied as buildings, for purposes of residence and business, is admissible.

Appeal from a judgment of the Superior Court of Sacramento County, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

GROVE L. JOHNSON, *for Appellant.*

FREEMAN & BATES, *for Respondent.*

FOOTE, C.

Action on a fire insurance policy. The plaintiff had judgment for the amount claimed; the defendant moved for a new trial, which was denied. From the order made therein and the judgment, an appeal was taken. The case was tried by jury.

* Opinion filed, October 30, 1888.—From *West Coast Reporter*.

One of the questions involved in it was, whether or not the fishing scow which was insured, was in the policy of insurance included in the word "building," and thereby affected by all the terms and conditions of the policy as a building. The defendant contended that it was so included, and that, therefore, it being unoccupied both at the time it was insured, and at the time it was burned, the plaintiff could not recover.

Another was whether or not the scow belonged at the time the policy was issued, and it was burned, to the plaintiff, or to one Valine.

The policy in question, among other things, contained the following clauses :—

"1st. The assured covenants that every fact and circumstance affecting the risk or hazard adversely to this company has been fully made known to the company.

"2d. That this company shall not be bound by any act or statement which is not contained in the written application or indorsed on this policy.

"3d. Waiver. The use of general terms or anything less than a distinct, specific agreement, indorsed or attached to this policy, shall not be construed as a waiver of any printed or written condition or restriction herein.

"4th. Conditions voiding this policy, without written permission indorsed hereon, or stated in writing in the application for this insurance * * * or if the above-described building or buildings, or either of them now are, or shall become vacant or unoccupied."

According to the second clause, it seems that the Sun Insurance Company, in its contract with the insured, had expressly exempted itself from being bound by "any act or statement" not contained in the application for the policy, or indorsed on said policy. Hence, no notice to its agent as to anything different from what the policy and application contained, would bind the company, and the defendant's instruction No. 4, on this point asked, should have been given.

Instruction No. 3, should have been granted, as the local agent, according to the terms of the policy, could not as claimed, waive any of the provisions of the policy; it could only be done by writing on it or the application : *Shuggart vs. Lycoming Fire Ins. Co.*, 55 Cal.,

408-43; Gladding vs. Ins. Ass'n, 4 West Coast Rep., 107; McCormick vs. Springfield Fire Ins. Co., 5 id., 230-232; Silverberg vs. Phoenix Ins. Co., 6 id., 482-484.

The defendant offered to prove by the witness, Frank I. Lewis, who had been for fourteen years engaged in the fishing business, on the Sacramento river, that scows of the kind and character as the one insured were used and occupied as buildings by the persons owning them. That in the fishing season such persons used them as residences, and places of business, and that when the fishing season was over they used them as residences on land. That this particular scow was so used, and that in the same locality as that of the one in controversy other scows were so used.

This evidence so offered was admissible. And upon it and the circumstances surrounding the transaction, it would have been proper for the court by instructions, to have left the jury to determine as a matter of fact, whether or not the parties making this contract of insurance, intended that all the limitations and conditions thereof, should apply to the scow as a building. This testimony having been excluded, the instructions on the point became useless and misleading.

None of the testimony as to conversations with Hoagland was competent. Nor was the proof offered by the defendant as to what consideration Enos had paid for the scow, as there was no question of a fraud on creditors involved in the case.

In so far as the charge of the court announced the law to be different from what we have indicated it to be in this case, there was error.

The judgment and order should be reversed and cause remanded for a new trial.

BELCHER, C. C., and SEARLS, C., concurred.

BY THE COURT. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

SUPREME COURT OF OHIO.

Error to the District Court of Delaware County.

FARMERS' INS. CO. }

vs. }

GEORGE W. WELLS.* }

An absolute condition in a fire insurance policy on a dwelling-house, that the policy shall be void—"if the building insured be vacated or left unoccupied" avoids the policy, although the vacation of the house results from the permanent removal of the tenant of the insured during the running of his lease, without the knowledge or consent of the landlord.

The original action was brought by George W. Wells, against the Farmers' Insurance Co., on a policy of insurance against loss by fire, to recover five hundred dollars, being the amount of risk taken on a certain dwelling-house of the plaintiff and which was wholly destroyed by fire, during the period for which the policy was written.

The policy attached to the petition in the case contains a condition therein written, that the policy shall be void "if the building herein mentioned be vacated or left unoccupied." The defendant answered that "at the time the said house was burned, and for some time prior thereto, it was left, and without the knowledge or consent of the defendant, wholly vacant and unoccupied."

To this answer plaintiff for reply denied each and every allegation contained therein.

It appears that at the time the policy was written, the dwelling-house therein described was occupied by one James Carpenter, as tenant of Wells, under a lease for one year, commencing on the first day of March, 1880. During the running of the lease, to wit, on the—day of October, 1880, Carpenter, with his family, removed from

* Decision rendered, January 20, 1885.

the dwelling-house, taking away his household goods, without any intention of returning, leaving in the house a barrel containing some bran and a coal-oil can. During the night following the removal, the house was burned.

On the trial in the Court of Common Pleas, Delaware County, the court charged the jury, "the company had a right to stipulate that the property should be occupied. The defendant claims it made this contract, that it should not be left unoccupied, that Carpenter and wife moved out with the intention of leaving and not returning there any more. The house is to be occupied as a residence, and not as a storehouse. They claim they went out the day before the fire, and did not intend to come back to occupy it as a residence, and now if Wells consented and knew that it was to be vacated, that was a violation of the contract, and the plaintiff cannot recover. If Carpenter went away without any consent or notice on Wells' part, that is not such a vacation as would avoid the policy. If the tenant leave without knowledge of the landlord, yet the landlord must know it, so he can make provision for a new tenant. If the tenant left the day before without the knowledge or consent of Wells, and there was not reasonable time to get some one to re-occupy the house, then it was not a vacation within the meaning of the terms of the policy. If the tenant should go away suddenly without notice to the plaintiff, that would not avoid the policy; he should have notice that he had left."

To this charge the plaintiff duly excepted, and requested the court to charge as follows: "If the jury should find that the house and premises in question, was occupied at the date of the policy by a tenant, and the tenant had removed from the premises before the time of the fire, and the house ceased to be used by any one living therein, then the house was vacated and unoccupied within the meaning of the terms of the policy, although some of the goods or furniture remained in the house at the time of the fire, and although the time of the tenant has not expired;" which charge the court refused and defendant excepted.

The verdict and judgment were rendered for the plaintiff, which judgment on petition in error, was affirmed by the district court.

This proceeding is to reverse the judgments below.

CRITCHFIELD & GRAHAM, for Plaintiffs in Error.

CARPER & VAN DEMAN, J. D. CRITCHFIELD, AND PARNELL, GILL & KAUFFMAN, for Defendant in Error.

McILVAINE, J.

We think the courts below erred.

The condition of the policy should be void, "if the building therein mentioned be vacated or unoccupied" was absolute. The parties to the contract were competent to make such stipulation, no fraud was practiced, no qualification to the condition in avoidance of the policy is found in the contract.

The only question, therefore, which arises in the case is, was the building vacated or left unoccupied?

It was insured as a dwelling-house. As a dwelling-house was it occupied at the time of insurance? On the facts this question must be answered in the affirmative.

At the time of the fire the tenant had removed therefrom, and had ceased to occupy it as a dwelling-house.

The leaving behind the barrel of bran and coal-oil can by the departing occupant did not prevent the avoidance of the policy. The length of the time elapsing after the vacation and before the fire is wholly immaterial. The cases relied upon as authority to the contrary by the defendant in error involved the construction of contracts materially different from this one. Here no construction or interpretation is needed; the plain and unequivocal terms of the contract must be enforced.

~ Judgment reversed and cause dismissed.

SUPREME COURT OF ILLINOIS.

Appeal from Appellate Court.

COVENANT MUT. BENEFIT ASS'N

vs.

SPIES ET AL.

The certificate required an annual assessment on or before a certain date, and the payment of a certain assessment on the death of every member; also that if said assessments were not received within thirty days of date of notice the certificate should be void.

Held, That there was no obligation to pay in the absence of notice of the annual assessment.

Held, That a court of appeal will not presume error in a ruling in the absence of such error being specifically pointed out.

Useless proof of a thing already satisfactorily proved, even if it be erroneously admitted, is not of itself ground of reversal.

The burden of proving a death is primarily on the plaintiff, but where the company was notified, and instead of sending instructions as to proofs, as requested, claimed that deceased was not a member, this was a waiver of proof.

Held, That the by-laws requiring such instructions to be sent upon notice of death was admissible as evidence.

SCHOLFIELD, C. J.

This was assumpsit, brought in the Circuit Court of St. Clair County, by the widow and children of Charles Spies, deceased, on a certificate of membership in the Covenant Mutual Benefit Association of Illinois, whereby that association promised to pay them \$5,000 upon the death of Charles Spies, subject to certain stipulated conditions. The defense interposed upon the trial in the circuit court was that the certificate of membership was canceled by the

association on the fifth day of December, 1882, because of the violation by the said Charles of a clause therein, whereby it was provided that if he should at any time after the certificate was issued, use alcoholic stimulants so as to seriously impair his health, the certificate should become null and void. The jury found the issues for the plaintiffs, and assessed their damages at the amount named in the certificate. The court, after overruling a motion for a new trial, rendered judgment upon the verdict, and that judgment was affirmed, on appeal, by the appellate court of the fourth district. The principal controversy in the circuit and appellate courts was on the question of fact; and that being finally settled against appellant, there are left for our determination but three questions, neither of which is of difficult solution, nor demands extended discussion.

First. It is contended that the court erred in refusing to give the ninth instruction asked by the defendant, which was as follows: "9th. You are further instructed that if you shall be satisfied from the evidence that the contract sued on required the annual payment of \$3 membership fees on or before September of each year, and that Charles Spies knew of the requirements, then if the jury shall believe from a preponderance of the evidence that Spies did not pay the membership fee for 1883, and made no tender of the money to defendant, or having made tender of it failed to keep the tender good by bringing the money into court, then the want of such payment or tender would not continue him a member of the defendant's association." The certificate of membership contains a clause marked "1," requiring the payment of an annual assessment of three dollars on or before the first day of September, and whereby the assured further agrees to pay on the death of every member of this association an assessment never to exceed one dollar and twenty cents." And the next clause in the certificate, which is numbered "2," is as follows:—

"The holder of this certificate further agrees that if the said annual or special assessments and collection of costs are not received by the association within thirty days from date of notice, then this certificate of membership shall be null and void, and of no effect." Very clearly the effect of this was to entitle the holder of the certificate to notice of the annual assessment before a default would occur for its non-payment. It was competent for the contracting parties to fix their own terms in this respect, and, having fixed them, they must abide by them. Thirty days after the date of the

notice, but not until then, the parties have contracted, if the money is not paid, the certificate shall be void. There was, therefore, no obligation to make a tender, in the absence of a notice, for the purpose of preventing a forfeiture; and the instruction was properly refused. Counsel for appellant, in their argument, concede that the non-payment of the three dollars did not render the certificate void; but they insist that the payment is a condition precedent which Spies or his legal representatives, or those claiming rights under his contract, were bound to perform or to offer to perform before he or they could ask performance upon the part of the appellant. This is a concession that the court properly refused the ninth instruction as asked. The proposition contended for was not ruled upon by the court, and it is, for that reason, impossible that any error can be assigned in regard to it. It is not before us, and we do not express any opinion upon it. Evidence in regard to a tender of three dollars was before the jury, and no specific erroneous ruling of law in that respect being pointed out, we cannot presume error.

Second. An objection is urged that the circuit court erred in permitting appellee's counsel to call appellant's secretary to the witness stand, on two different occasions, and to be interrogated as to whether he had specially sent Spies notice of his annual dues. Inasmuch as it is not pretended that in the absence of such notice, the certificate could not be annulled for the non-payment of the amount, it is evident appellant was not prejudiced by this ruling. Providing the same thing twice, when the first proof is completed and distinctly understood, is a useless waste of time; but it is not perceived nor satisfactorily shown how such useless proof could improperly affect some other question.

Third. The only other objection raising a question of law is that the court erred in admitting in evidence a by-law of appellant, as follows: "Upon receipt of notice of the death of a member of the association, the secretary shall immediately forward to the representatives of the deceased the proper blanks, and full instructions how to make proofs of death." The objection assumes that the question of the death of Spies was contested, and the onus of proof on appellees. Primarily, the burden is, undoubtedly, on the plaintiffs in such cases to prove the death; but that proof may be waived. The record here shows that appellant was notified of the death of Spies, and requested to send instructions as to the proofs required of that fact, and the appellant thereupon, instead of sending the requested instruction, set up the claim that Spies

was not a member of the association at the time of his death and that the certificate has been canceled. And this claim has ever since been consistently adhered to throughout the litigation. This was a waiver of the proofs of death: *Gratton vs. Metropolitan Life Ins. Co.*, 80 N. Y., 281; *May on Ins.*, Sec. 469. We incline to the opinion that the evidence, if proof of that which it was introduced to establish had not been waived, was admissible. Spies was a member of the association. The by-laws were binding upon the association and all its members, and the contract was made with reference to the powers and duties of the association as fixed by its charter, and its by-laws pursuant thereto. The widow and children of Spies had a right to assume and rely on the performance of the by-laws. See *Protection L. Ins. Co. vs. Foote*, 79 Ill., 362; *Woodfin vs. Ashville etc. Co.*, 6 Jones (N. C.), 558. Perceiving no error of law in the ruling below, the judgment will be affirmed.

Judgment affirmed.

SUPREME COURT OF IOWA.

Appeal from Audubon Circuit Court.

WEBSTER

vs.

CONTINENTAL INS. CO. OF NEW YORK.*)

Where the company claimed that no proofs of loss had been furnished, and the insured answered that such proofs had been waived, the company, on motion, is entitled to have it specifically stated whether the waiver was oral or written, and by whom made.

Action on a policy of insurance against loss or damage by fire and lightning. Trial by jury. Verdict and judgment for the plaintiff. The defendant appeals.

R. W. BARGER, *for Appellant*, Continental Ins. Co., of New York.

J. L. STOTTS and GRIGGS, BRAINARD & GRIGGS, *for Appellee*, H. Y. Webster.

SEEVERS, J.

In the fourth division of its answer, the defendant pleaded as a defense that it had not been furnished with the proofs of loss required by the terms of the policy. To this defense the plaintiff filed a reply, and therein pleaded—First, that all the proofs required by the laws of Iowa had been furnished, as shown by the petition; and second, that the defendant waived further proofs than such as had been furnished. The defendant filed a motion, asking that the reply be made more specific, and the plaintiff be required to state—

* Opinion filed, Dec. 8, 1885.

First, whether the waiver pleaded was oral or in writing; and, second, what officer or agent of defendant waived or undertook to waive the same, and for cause, in substance, stated that the defendant could only act through its officers or agents, and that it had many such in its employ, and it was impossible, from the reply, to determine by what officer or agent the waiver pleaded and relied on was made. The first ground of the motion was sustained, and the second overruled. We think the court erred in not sustaining the entire motion.

The defendant can alone act through its officers and agents, and it is a well-known fact that insurance companies have many such. Now, a valid and sufficient defense was pleaded, to avoid which the plaintiff pleaded that such defense had been waived by the defendant. It is evident that this was done by some officer or agent. The defendant could not reasonably be expected to know what officer or agent had done so. The plaintiff did; for if there was a waiver, the plaintiff must necessarily know who made it, just as certainly as he knew whether it was in writing or not. The defendant, in order to be fully prepared to successfully controvert the waiver pleaded by the plaintiff, must be prepared at the trial to produce the evidence of every officer or agent of the company who had authority to make such waiver. This is asking too much of any litigant. Common fairness, in making up the issues, we think, requires that the plaintiff should state who made the waiver relied on to avoid the defense pleaded. There are several other questions in the case which, in the view we have taken, we deem it unnecessary and possibly improper to determine. Reversed.

LOWER COURT DECISIONS.

RIGHTS OF TONTINE POLICY-HOLDERS.

Supreme Court of New York.

FRANCES H. SIMONS.

vs.

NEW YORK LIFE INSURANCE COMPANY.

Where the authority of the agent as to representations was limited to the written statements in the application, and the plaintiff was aware of this through the policy, and a prospectus was also read to her setting forth the full nature of the tontine plan, which prospectus was in evidence, further oral representations of the agent were immaterial, and not admissible to show fraudulent representations on the part of the company.

Evidence of failure on the part of the company to carry out the contract is inadmissible under a charge of fraud in the shape of an inducement to enter into it, and evidence of such fraud is inadmissible under charge of failure to carry it out.

No rights accrue under a tontine contract until the tontine period has expired.

A tontine policy is not a gambling contract, and the scheme does not affect the status of a policy as a life insurance contract.

A representation that the surplus from tontine policies should be set aside, does not require that the moneys received should be separated, but only that a separate account of the same should be kept.

DYKMAN, J.

On the 15th day of February, 1875, the plaintiff procured from the defendant a policy of insurance on the life of her husband in the amount of \$5,000, on what is called the tontine investment policy plan; which seems to be a plan with a double aspect. In the first place, the person is insured in the amount of five thousand dollars for the term of his natural life, with the conditions and restrictions usual in an ordinary life policy.

Then it was provided that the policy was issued and accepted on certain special agreements and conditions relative to policies on the

* Decision rendered, Dec. 18, 1885.

tontine investment policy plan, and they were substantially as follows:—

The policy was issued on the tontine investment policy plan, and the tontine dividend period was to be completed on the eleventh day of February, 1885. No dividend was to be allowed or paid upon the policy, unless the person whose life was insured should survive until the completion of the tontine dividend period, and unless the policy should then be in force, all surplus or profits from such policies on the tontine investment policy plan as should cease to be in force before the completion of their respective tontine dividend periods, were to be apportioned equitably among such policies of the same class as should complete their tontine dividend periods in the same year.

After the completion of the tontine dividend period, on the eleventh day of February, 1885, if the policy had not been previously terminated by lapse or death, the accumulation apportioned to this policy secured to the assured one of the following benefits: "First. To apply the accumulated dividend to the purchase of an annuity during the continuance of the life of the insured, payable to the insured or assigns. Second. To continue the assurance for the original amount, and withdraw the accumulated dividend upon this policy in cash, payable to the insured or assigns. Third. To withdraw the entire equity (i. e. the accumulations that belong to this policy) in cash. Fourth. To convert the entire equity into its equivalent in a paid-up policy, without participation in profits," in compliance with a proviso not material here. "Fifth. The conversion of the entire equity into an annuity, to continue during the life of the insured." All these benefits were at the option of the insured.

The premiums were paid down to the eleventh day of February, 1880, and then the policy lapsed for non-payment of premiums, according to one of its conditions.

There was a stipulation in the body of the policy that no representation made by the person procuring the application therefor should be binding on the company unless the statement was reduced to writing and presented to the officers of the company at the home office in the application. There was no such statement in the application for this policy.

The plaintiff commenced this action in the year 1882, while her husband was yet alive. Setting out in her complaint the substance of the policy, and a description of the tontine principle, and alleging

that at the time of the issuance of the policy the defendant represented to the husband of the plaintiff, who was her agent in that behalf, that the policy about to be issued had many and great advantages over the ordinary form of insurance, and among other things stated the principle of the tontine plan substantially as it was. That the plaintiff relied solely and entirely on the representations so made, and accepted the policy on such reliance.' That such representations were false and fraudulent, and that the defendant did not perform the obligation assumed by the policy in many respects, which are specified, and that by reason of the violation of the contract by the defendant, the benefits of the same have been lost to the plaintiff to her damage of twenty-five hundred dollars, which she seeks to recover in this action.

The complaint was dismissed on the trial, and the cause comes here on appeal from that judgment.

On the trial it appeared that the application was made to the husband of the plaintiff by an agent of the company, who produced a pamphlet issued by the company, from which he read portions himself and allowed the husband to read it also.

The counsel for the plaintiff read from this pamphlet a description of the tontine principle, and an explanation of its peculiarities and advantages substantially as they were set out in the complaint. The counsel for the plaintiff then asked her husband, who was a witness for her, this question: "What further representations did he (the agent) make to you at the time in regard to the advantages of this tontine investment plan as compared with other plans of insurance?"

This was objected to and excluded, and then various other questions were propounded to the witness with a view of presenting the same question in various aspects and all the testimony was excluded.

The witness then testified that the agent made statements and explanations of the tontine plan in addition to those contained in the pamphlet, and was asked what those statements were. That testimony was also excluded.

This question was also asked and rejected:—

"Question. In accepting this policy did you rely upon the representations made to you touching the advantages of this plan over other plans, and touching the manner in which the funds or profits accruing to the assured were to be kept and preserved?"

The court decided that the counsel might inquire as far as the pamphlet was concerned, and that the inquiry must be so limited.

In the application, one of the questions asked of the plaintiff was, whether the tontine plan had been fully explained to her, and whether she authorized the company to retain the dividends on the policy thereby applied for, and to place the same in a reserve fund in which she was to participate, in accordance with the provisions made by the company regarding policies in the same class she had selected, and not otherwise, and her answer was in the affirmative.

It was the claim of the plaintiff's counsel, on the argument of this appeal, that this action was for fraud, and that the exclusion of the representations made by the agent of the defendant when he solicited the application was erroneous, because the fraud was then and there perpetrated by him in that way.

The answer to this seems to be that the power and authority of the agent to make representations were limited to statements made in writing and presented to the officers of the company in the application, and the plaintiff was made aware of this restriction because it is contained in the policy itself; more than that, the pamphlet, containing a full and true description and representation of the tontine plan of insurance, was read by the agent of the plaintiff, and there was no concealment or misrepresentation on that subject. If, after that, the agent made representations respecting the advantages of the plan over other systems and forms, they were quite immaterial, and amounted simply to recommendation and opinion. They had no tendency to deceive or mislead the plaintiff or her husband so long as the plan itself was explained to and understood by them.

Commendation is not representation; even exaggeration differs widely from intentional falsehood; general assertions as to value or advantage cannot be made the basis of an action for deceit; an expression of opinion is not a representation of fact upon which a charge of fraud can be predicated. Even assuming that there was misrepresentation by the agent, the plaintiff was not misled, for the whole of the system was laid before her truly by the reading of the pamphlet. These reasons seem to be a sufficient justification of the ruling which rejected the representations of the defendant's agent beyond the facts embodied in the pamphlet. If there be no proof of the perpetration of a fraud, aside from the declaration of the defendant's agent, not reduced to writing as contemplated by the policy of insurance, then there should be no recovery on that ground. All the representations by the company were contained in the pamphlet, and that stated the plan of tontine insurance, as carried into practice by the defendant, with accuracy; and the

plaintiff was notified that the agent was not authorized to make any further or other statements except in a particular manner which was not pursued.

The complaint in this action wears two aspects not entirely consistent with each other. It alleges that at the time of the issuance of the policy certain false and fraudulent representations were made, that the plaintiff relied on them and believed them and accepted the policy. Then it is alleged that such representations were false and fraudulent, and that the defendant violated them in several particulars which are specified. Then it is charged as a result of the facts stated, "that by reason of the violations and breach of contract as aforesaid on the part of the said defendant, the benefits of said contract have been lost to the said plaintiff to her damage in the sum of twenty-five hundred dollars," and judgment is demanded for that sum. Evidence of the failure of this company after this contract was made, to execute and carry it out, was inadmissible under the charge of fraud perpetrated as an inducement to its foundation before it had its inception, and so conversely testimony to establish fraud perpetrated before this contract was consummated, as inducement to make it, was not proper or material under the charge of a breach or failure to perform the contract after its execution.

Then, in the points submitted by the appellant on this appeal, it is stated that the action is brought to recover damages by reason of false representations and breach of contract.

It was also claimed by the appellant that the action was for fraud, and therefore she had the right to prove all the representations made by the agent of the defendant when the contract was made.

Our examination of the case has thus far proceeded on that theory, and we have so far found nothing for its support.

In the examination of the case on the other theory, it is to be remarked that at the time of the commencement of this action, the tontine period of ten years had not expired. So that she had no interest in the tontine fund, and it could not appear that she ever would have, for her husband might not survive this tontine period; until the expiration of that period in the lifetime of her husband, she had no rights in the fund. Both the expiration of the period and the survival of her husband were conditions precedent to the accruing of any rights to the plaintiffs in such fund.

Neither do we find evidence of any breach of the contract by the defendant. The breach alleged is that the defendant did not, from the inception of the policy, or of the class of policies to which it

belongs, or at any time, keep the funds arising therefrom separate and apart from the funds of the company, and did not invest the same separately for the benefit of the plaintiff and other persons of the same class, but, on the contrary, mingled the same with the general funds of the company.

In answer to this, it is to be said that there is no proof of any undertaking or agreement on the part of the company to keep such fund separate from the other funds of the company, and no reason is disclosed for so doing.

Further, it is to be said, that the plaintiff has forfeited all her rights under the policy named as a contract of insurance, by the failure to pay the annual premiums, and so her rights are foreclosed for that reason on this branch of the case.

The contract was not rescinded by the plaintiff, and she did not refuse to pay the premiums on that ground; neither is the complaint framed on the theory of a rescission. The action is not for money had and received or improperly obtained, but for the recovery of damages.

It was claimed by the counsel for the appellant, on the argument, that this insurance contract was a gambling contract, and that the plaintiff was in effect betting on the chances of the continuance of her husband's life, beyond the tontine period of ten years, and that the company had bet against her. We cannot assent to this view. All insurance is based, more or less, on the doctrine of chances; but they are by no means gambling contracts, unless they are wager policies, and then they are void in law. But this consideration need not be further pursued, for the plaintiff can obtain no advantage from the position, even if it be tenable. Her action is not based on the law against gaming, and she is in *pari delicto*, even if the contract was immoral and void.

This policy is a policy of insurance on the life of the plaintiff's husband, payable at his death, if the annual premiums have been paid and the policy is in force at that time. So far as that contract of insurance is concerned, there is no claim that the defendant has not fully complied with its undertaking.

One part of every premium is set aside to accumulate as a fund toward the payment of the policy when it becomes a claim against the company. That fund is called the reserve fund. Another part of the premium is consumed in paying the costs of insurance and expenses.

The remaining third part, augmented by the excess of interest

earned upon the reserve of the policy, is surplus. Under an ordinary policy, this surplus is annually returned to a policy-holder in some way agreed on, and is commonly called dividend.

On this policy has been engrafted the system called tontine, under which that surplus, instead of being divided and paid to the policy-holders, goes to a fund called the tontine fund, the amount being credited to the particular class to which the policy belongs. When a policy lapses, the reserve value becomes profits, and under this scheme such profits are divided among the surviving holders of the various classes.

Such in substance is the tontine scheme, and such it was represented to be by the pamphlet issued by the company, and read in evidence on the trial of this action. The annexation of the plan to the policy did not invade nor vary the legal effect of that instrument as a policy of insurance for life. It merely constituted a consent for the retention of the surplus dividend by the company during the tontine period, at the termination of which the accumulations from all sources are to be divided among the surviving holders of policies of that class in existence. The representation complained of had reference only to the surplus dividends left with the company by consent of the insured for accumulation during the tontine period.

The allegation of the complaint, however, is that the fund arising from premiums paid upon policies belonging to the tontine class were to be kept separate and distinct from premiums paid upon other classes and kinds of policies issued by the defendant, and would be separately kept invested and accumulated in trust for the benefit of the surviving members of the tontine class.

If such representations were made by the agent to the plaintiff and her husband, they had full information that the tontine scheme contemplated nothing of that kind.

In the portion of the pamphlet read in evidence on the trial by the counsel for the plaintiff, it was stated distinctly that the annual surplus arising from the policies in each class would be set aside to accumulate for the stipulated number of years; not that the fund arising from the premiums was to be set aside nor that any separate investment was to be made.

The representation, therefore, had reference to a subject which had been fully explained to the husband of the plaintiff from the same pamphlet, and a false guarantee or representation can be founded on nothing that is open and visible and well understood. They only apply to secret defects and unexplained faults.

Again, these representations, taken at their worst, related only to the future.

No fact was misrepresented, and the sole claim is that in the future the tontine fund was to be invested and handled separately. That at most would constitute a condition subsequent in the contract, for the violation of which the plaintiff might obtain appropriate redress.

The plaintiff has no interest in the mode of investing and handling these funds. Her interest is subserved if the persons insured on this plan are divided into classes and separate accounts are kept with each class on the books of the company.

It appeared in evidence that this had been done, and that each policy was credited annually with the surplus dividend it would have received each year if it had not been a tontine policy. Also, that when any policy in the class lapsed for non-payment of premiums or any other cause, or matured by death, the amount of its accrued dividends so credited, augmented by compound interest, was credited to the class.

This is in full compliance with the declaration in the pamphlet, that the annual surplus arising from the policies in each class will be set aside for accumulation.

So it appeared that all the legal rights of the plaintiff were properly guarded and secured.

We cannot discover that the counsel for the appellant claimed on the argument of this appeal that the statements of the tontine plan in the policy and in the pamphlet were indefinite or uncertain, for the statement is very plain and very easily understood, and no testimony of experts or witnesses of any kind is required for its elucidation or comprehension.

It must be borne in mind after all, that the plaintiff never acquired any vested rights in the tontine fund, because she voluntarily ceased the payment of premiums, and her policy lapsed for that reason before the expiration of her tontine period.

We can discover no ground upon which a recovery for the plaintiff can be founded.

We have examined carefully all the exceptions taken on the trial and find no error, and our conclusion is that the complaint was properly dismissed. The judgment should be affirmed with costs.

BARNARD, P. J., and PRATT, J., concur.

NOTICE OF CANCELLATION TO AGENTS.

Superior Court of New York.—General Term.

SAMUEL VON WIEN, *Appellant*,

vs.

SCOTTISH UNION AND NATIONAL INS. CO., *Respondent*.*

The agent of the insured for the purpose of procuring insurance, is not from that fact his agent to receive notice of cancellation.

The case is not affected by a clause that the insurance broker shall be deemed the agent of the insured in any transaction relating to the insurance, for notice of cancellation does not relate to the insurance.

The delivery of the policy without payment of premium raises a presumption that credit was intended, but in such case offer to return a premium is unnecessary.

Before FREEDMAN and TRUAX, JJ.

Appeal from judgment entered on the verdict of a jury and from an order denying a motion for a new trial on the judge's minutes on the grounds set forth in sec. 999 of the Code of Civil Procedure.

The action was brought to recover upon a policy of insurance for a loss sustained by fire.

BENNO LOEWY, *for Appellant*.

WETMORE & JENNER, *for Respondent*.

TRUAX, J.

The trial judge erred in allowing the defendant to prove that it had given notice of the cancellation of the policy to Rieger, or in other words, it was error to hold that Reiger was the plaintiff's

* Decision rendered, December 7, 1885.

agent to whom notice of the cancellation of the policy could be given.

The evidence shows that Rieger was employed by the plaintiff to procure certain insurance, and that he procured that insurance. His employment—his agency—then ended, and notice to him was not notice to plaintiff.

The defendant claims that Spitzer was plaintiff's agent and that Rieger was Spitzer's, and therefore, plaintiff's agent. But there is no evidence that tends to show that Spitzer was plaintiff's agent for any other purpose than the purpose of procuring insurance.

When the insurance was procured, his agency ended.

This view of the case is not affected by the clause of the policy, that the insurance broker "shall be deemed to be the agent of the insured in any transaction relating to the insurance."

The giving notice of cancellation of the policy does not relate to the insurance ; it relates to the cancellation of the contract of insurance and not to the making of such contract. An authority to make a contract for another does not carry with it by implication, authority to cancel that contract : *Hodge vs. Security Ins. Co.*, 33 Hun, 583 ; *Stillwell vs. Mut. Life Ins. Co.*, 72 N. Y., 385 ; *Van Valkenburgh vs. Lenox Fire Ins. Co.*, 51 N. Y., 469 ; *Grace vs. American Central Ins. Co.*, 109 U. S., 278.

This rule works no hardship to the insurer. The right to cancel the contract of insurance still remains. It only requires that notice of cancellation shall be given to the insured, or to his agent to whom he has given an authority to receive such notice.

The cases of *Rohrbach vs. Germania Fire Ins. Co.*, 62 N. Y., 47, and *Alexander vs. Germania Fire Ins. Co.*, 66 N. Y., 464, deal with matters before the issuing of the policy (*Whited vs. Germania Fire Ins. Co.*, 76 N. Y., 419), and the court of appeals say in the case last cited that it has not yet extended the clauses of the policy quoted above beyond matters that occurred before the issuing of the policy (p. 419), I cannot find that it has extended that clause any further since the decision of the *Whited* case.

This remark is to be borne in mind while considering the case of *Standard Oil Co. vs. Triumph Ins. Co.*, 64 N. Y., 85, in which case the persons who procured the insurance were the plaintiff's agents, generally for placing and keeping upon plaintiffs property a large line of insurance (see p. 86), and they returned the policy for cancellation (87). The question of notice of cancellation to an agent is not in that case.

The policy of insurance was delivered to the plaintiff without requiring the payment of the premium.

This raises the presumption that a credit was intended and the policy is valid : Washoe Tool Co. vs. Hibernia Ins. Co., 66 N. Y., 613; Angell vs. Hartford Fire Ins. Co., 59 N. Y., 171; Bowman vs. Agricultural Ins. Co., 59 N. Y., 527. But the fact that credit was given does not make it necessary for the defendant to offer to return a premium that it never had received.

The judgment and order appealed from are reversed and a new trial is ordered, with costs to the appellant to abide the event.

THE INSURANCE LAW JOURNAL.

VOL. XV.

MARCH, 1886.

No. 3

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

*In Error to the Circuit Court of the United States for the Eastern
District of New York.*

LIVERPOOL & LONDON & GLOBE INS. CO.,
Plaintiff in Error.

vs.

AMELIA AUGUSTA GUNTHER, EXECUTRIX, AND
GEORGE A. GUNTHER, EXECUTOR OF
CHARLES GODFREY GUNTHER, DE-
CEASED.*

The policy on a hotel provided that the assured should not keep any burning fluid without written permission; that kerosene, carbon oils of any description, or any other inflammable liquid, are not to be stored, used, kept, or

* Decision rendered, December 21, 1885.

allowed on the premises, temporarily or permanently, for sale or otherwise, without written permission, except the use of refined coal, kerosene, or other carbon oil for lights if the same is drawn and the lamps filled by daylight. Otherwise, the policy shall be null and void.

Held, That an averment of the keeping and using of kerosene in violation of the condition sufficiently alleges its use otherwise than for lights, and its drawing otherwise than by daylight.

Held, That a violation of the conditions by any one permitted by the insured to occupy and control the premises, is a violation by the insured.

Held, That an indorsement on the policy of privilege to use gasoline gas, gasometer, blower, and generator being distant sixty feet from building, did not sanction the keeping or storing of gasoline, except as needed for actual use in the apparatus, and where such use of the apparatus had been discontinued, the further keeping was not authorized.

Statement.

This is an action at law brought by Charles Godfrey Gunther, a citizen of New York, in the supreme court of that State, against the plaintiff in error, a corporation created by the laws of Great Britain, and consequently an alien, and by the latter removed into the Circuit Court of the United States for the Southern District of New York. There was a verdict and judgment for the plaintiff below, brought here for review by this writ of error.

The object of the action was to recover the amount claimed to be due on two policies of fire insurance, issued by the defendant below, in favor of the plaintiff, one for \$20,000 on the two-story hotel, frame building, with one-story, frame kitchen, and two-story, frame pavilion building adjoining and communicating, situate in Gravesend Bay, of Bath, Kings County, Long Island; \$1,000 on the two-story, frame stable occupied in part as a dwelling, and \$200 on frame bathing-houses, and the other for \$8,500 on the contents of the buildings insured. The loss by fire is alleged to have occurred on August 15th, 1879, while both policies were in force.

The execution of the policies and the fact of the destruction by fire of the insured premises were admitted by the answer, which, however, denied generally all the allegations of the complaint not expressly admitted, or otherwise controverted in the answer, and, in addition, set out the following special defense:—

“Tenth. For a separate and distinct defense to the causes of action alleged in the complaint, in addition to the matters and things hereinbefore set forth, the defendant avers that it was provided in and by the terms and conditions of said policies of insurance, among other things, as follows: ‘If the assured shall keep gunpowder, fireworks, nitro-glycerine, phosphorus, saltpeter, nitrate

of soda, petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid, or chemical oils, without written permission in this policy, then and in every such case this policy shall be void;' and further, 'That petroleum, rock-earth, coal, kerosene, or carbon oils of any description, whether crude or refined; benzine, benzole, naphtha, camphene, spirit gas, burning fluid, turpentine, gasoline, phosgene, or any other inflammable liquid, are not to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on this policy, excepting the use of refined coal, kerosene, or other carbon oil for lights, if the same is drawn and the lamps filled by daylight; otherwise, this policy shall be null and void.'

"And the defendant avers that the said conditions of insurance were broken and violated on the part of the plaintiff, among other things, in that without written permission of the defendants, indorsed on said policies or otherwise, there were stored, used, kept, and allowed on the insured premises mentioned and described in said policies, benzine or benzole, or other inflammable burning fluids or liquids, prohibited by said policies, and defendant avers that the fire mentioned and referred to in the complaint originated and was caused by such storing, using, keeping, and allowance of such prohibited articles on said insured premises, and defendant avers that it is advised, and believes that, by reason of the premises, the said policies became and were null and void."

Each of the two policies, after the description of the premises insured, contained the following clause: "Privilege to use gasoline gas; gasometer, blower and generator being underground about 60 feet from main building, in vault; no heat employed in process." Among the conditions in the body of the policies is also the following:—

"Petroleum, rock-earth, coal, kerosene, or carbon oils of any description, whether crude or refined; benzine, benzole, naphtha, camphene, spirit gas, burning fluid, turpentine, gasoline, phosgene, or any other inflammable liquid, are not to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on this policy, excepting the use of refined coal, kerosene, or other carbon oil for lights, if the same is drawn and the lamps filled by daylight. Otherwise this policy shall be null and void."

To the first policy there was attached the following: "Privileged

to use kerosene oil for lights, lamps to be filled and trimmed by daylight only." And also the following: "Privileged to keep not exceeding five barrels of kerosene oil on said premises."

To the second policy the first only of the foregoing privileges was attached.

On the trial, the plaintiff, having produced the policies sued on, with the renewal receipts, showing that they were in force at the time of the loss, was called as a witness, and testified, among other things, as follows:—

"I was the owner of the insured property at the time of the insurance, and have continued such until the present time. A fire occurred on the 15th of August, 1879, about dusk, by which the building and its contents were totally destroyed. I was seated on the piazza of the building proper in sight of the pavilion. I saw some parties with pails and a light. There were some children playing. Mr. Lanier Walker was playing with some boys around some small trees that I had planted in the lot, and my attention was attracted by hallooing, and I saw the men come out as though they were on fire. It did not occur to me then that there was any fire in the oil room, although I saw it. I saw these men, and ran out and said, 'Roll in the grass.' One man struck for the water and the other one had the fire thrashed out by the crowd. In another instant, I saw the oil-room burning. The wind was from the southwest, blowing very hard right over the kitchen. The pavilion immediately caught, and in one hour's time or less, the building was level with the ground."

The proofs of loss were read in evidence and the amount of the loss proven. The plaintiff also testified that during the summer of 1879 he had a room at the hotel, where he stayed on an average of four nights out of the week. The rest of the time he was in New York. Mrs. Fanny Walker kept the hotel as his tenant, her husband, Mr. John Walker, being manager for her.

The plaintiff having rested his case, the defendant introduced evidence, not objected to, tending to prove the following facts:—

A gas-making apparatus for the use of gasoline, including a gas-meter, generator and blower, about sixty feet from the house, and all underground but the roof, had been in use for lighting the main building for about eleven years up to and including the summer of 1878, but its use was discontinued in the fall of 1878, and it was not in use at all during the year 1879.

There was an oil-room in the basement of the hotel under the

pavilion, about ten by twelve feet, with low ceiling. In this room the lighting material was kept.

The fire originated in the oil-room "about dusk, August 15, 1879." Three persons were in the room at the time—Jacob Constine, James Marion and one Schuchardt. The last named was in Walker's employ as night-watchman, and had charge of the oil-room. The others were employed at premises about a mile distant from the Locust Grove Hotel, called the Bath Park Hotel, where gasoline was used for lighting the last-named hotel and an adjoining pavilion.

Constine and Marion were sent by the book-keeper of the Bath Park House to the Locust Grove Hotel to borrow five gallons of gasoline, and each of them carried a wooden pail in which to fetch it. On reaching Locust Grove they saw Walker, who directed Schuchardt to give them the gasoline. Schuchardt took them into the oil-room. He carried a glass lantern with a wire frame around it—"a regular closed stable lamp with wire and then little holes on top." The lamp was lighted.

Schuchardt placed the lantern on the floor and drew fluid from a barrel which was raised on stanchions, a little above the floor. He drew from the end of the barrel, into which a piece of gas-pipe had been placed as a faucet. On pouring into the pails it was found that one of them leaked, and Schuchardt got a five-gallon can into which to pour the oil, and while filling the can there was "a sort of bluish flame and explosion, and the place was full of fire."

The fire spread with great rapidity. Schuchardt was burned to death. Constine was badly burned, and was laid up thirteen weeks. Marion was burned a little, not much.

The hotel and all the buildings were destroyed by the fire. "In one hour's time or less the building was level with the ground."

There was no conflict of evidence as to the origin of the fire.

Walker purchased in New York and had shipped to the hotel, on August 13, a barrel of kerosene, and a half barrel of benzine containing about 21 gallons, which were received and put into the oil-room under the pavilion on the morning of August 14, the day before the fire. There was evidence tending to show that gasoline, benzine, or naphtha was used in torches for the purpose of lighting the pavilion; and also other evidence that it was intended for use in lighting grounds for a picnic.

The plaintiff introduced evidences in rebuttal, tending to prove that no gasoline or benzine had been brought to the premises or was kept there. The testimony having been closed on both sides, the

defendant's counsel then requested the court to direct the jury to find a verdict for the defendant on the ground that it appeared from the undisputed evidence that there was a violation of the condition of the policy providing that in the use of refined kerosene oil the same must be drawn by daylight, the evidence being undisputed that three persons went into the oil-room with a lighted lamp, and that whatever was drawn there was drawn not by daylight, but by the use of a lighted lamp, the presence of which was the direct cause of the fire. The court refused so to direct the jury, to which refusal the defendant's counsel then and there excepted.

The defendant's counsel requested the court to instruct and charge the jury as matters of law, as follows:—

1. That the several conditions contained in the policy respecting the keeping, using, or allowance on the insured premises of the products of petroleum, specified therein, were lawful provisions, and formed a part of the conditions of the insurance, which, if violated, rendered the policy void.

2. That if the jury believe from the evidence that gasoline, naphtha, or benzine were kept, used, or allowed on the insured premises at the time of the fire, whether permanently or temporarily, the plaintiff cannot recover, and the defendant is entitled to a verdict.

3. That if the jury believe from the evidence that gasoline, naphtha, or benzine was used in the summer of 1879, previous to the fire, on the insured premises for lighting the pavilion by means of the torches described in the evidence, then the plaintiff cannot recover, and the defendant is entitled to a verdict.

4. That if the jury believe from the evidence that any fluid product of petroleum used for lighting purposes was actually drawn after sundown, in the oil-room by the light of a lamp, the flame of which ignited the fumes or vapors of such fluid and caused the fire, then there was a violation of the conditions of insurance, and the plaintiff cannot recover, and the defendant is entitled to a verdict. Also, and as a part of the above request, that the permission indorsed on the policy to keep five barrels of kerosene oil did not vary or affect the conditions of the policy in drawing refined oil by daylight; and if the fire was caused by drawing refined kerosene oil after sundown, and in the presence of a lighted lamp, the plaintiff cannot recover, and the defendant is entitled to a verdict.

5. That if the jury believe from the evidence that the risk of fire was increased by the actual presence on the insured premises of gasoline, naphtha, or benzine, then the plaintiff cannot recover, and the defendant is entitled to a verdict.

6. That, irrespective of the questions raised by the preceding fourth and fifth requests, if the jury believe from the evidence that the fire was caused by the ignition of the fumes of gasoline, naphtha, or benzine in the oil-room, while such gasoline, naphtha, or benzine was being drawn from a barrel or keg, or poured from one vessel to another in the oil-room, then the plaintiff cannot recover, and the defendant is entitled to a verdict.

7. That if any of the conditions of the policy were violated by the presence or use of gasoline, naphtha, or benzine on the insured premises, it is immaterial whether or not the plaintiff knew of such violation. If the fact of the violation is established, the defendant is entitled to a verdict.

8. That the permission in the policy to use gasoline gas, the generator, gasometer, and blower to be under ground 60 feet from the main building, no heat to be used in the process, did not authorize the plaintiff, or any one occupying the premises under him, to use gasoline, naphtha, or benzine for lighting the pavilion by the torches described by defendant's witnesses, or to keep gasoline, naphtha, or benzine in the oil-room for use in such torches.

9. That in weighing the evidence the jury must determine on which side the preponderance of proof lies, and decide accordingly. That the testimony of the plaintiff in his own favor must be scrutinized in view of his interest as plaintiff, and that the evidence of witnesses not discredited or impeached, who swear positively to certain facts as within their own knowledge and actual observation, is not to be overcome by mere negative testimony of other witnesses that such facts were not observed by them at the same time and place.

At the conclusion of the charge, a juror asked the court whether the jury were to consider the matter of drawing oil in the daylight.

The court thereupon charged and instructed the jury that there was no question in the case in reference to the drawing of the oil by daylight, no such question having been made by the pleading; to which ruling and charge the defendant's counsel then and there excepted.

The defendant's counsel then excepted specifically to that part of the charge which instructed the jury that any question arose in the case under the permission in the policy to use gasoline gas.

The defendant's counsel then further excepted specifically to the refusal of the court to charge that if benzine was allowed on the premises at all the plaintiff cannot recover, so far as the court did refuse.

The defendant's counsel then further excepted to that portion of the charge which confined the questions in the case to the three questions specified in the charge as being the sole questions which the jury were to consider.

The defendant's counsel then further excepted specifically to that portion of the charge which instructed the jury that if the benzine was brought to the insured premises by Walker for an outside purpose it did not vitiate the policy.

The defendant's counsel then further excepted specifically to that portion of the charge which instructed the jury that the only effect of the question whether torches were used, was in reference to the question of the half barrel of benzine being brought to the insured premises or not.

The defendant's counsel then further specifically excepted to the refusal of the court to charge the several propositions contained in the foregoing second, third, fourth, fifth, sixth, seventh, eighth, and ninth requests on the part of the defendant in the language as requested, and separately to each separate refusal to charge each separate request, so far as the court did so refuse.

In the charge to the jury, the circuit court stated, in substance, that under the pleadings and upon the evidence there were but three questions for their consideration. The first was, whether in fact the half barrel of benzine testified to, had been brought to the premises and stored in the oil-room; if not, the whole defense was taken away, and the verdict must be for the plaintiff.

Second. If otherwise, had it been brought over and stored there by the authority of Walker in his management of the premises for his wife under her lease? If it had been brought and stored there by him for an outside purpose, referring to some testimony in reference to its intended use in lighting the picnic grounds, then the verdict should be for the plaintiff.

Third. This question was stated by the court, as follows:—

"If it was brought there, and brought there by Walker in the course of his management, then would bringing that benzine there and putting it in the oil-room come within what would be expected when the company gave the assured the privilege of using the gasoline gas, the gasometer, generator, and blower to be under ground sixty feet from the main building? It would not come within that, unless you can say that by the common and ordinary mode of the use of such apparatus, as it would be understood by this contract to be used, it was proper to store somewhere else benzine or gasoline for use in the apparatus. If you can see that it would come within that, then that would be written permission to have so much stored there, although it was not to be used for that purpose. And if you find that the benzine was there, and then that Walker got it there, still, if you find that it came within that clause of the policy, then you may return a verdict for the plaintiff; otherwise, you must return a verdict for the defendant.

"If the defendant has made out these three things, then you must return a verdict for the defendant, and you must find this upon the proof, and not upon any conjecture.

"And I feel bound to say to you that as to the use of a gasometer, generator, and blower, it is a matter with which perhaps you might not be familiar (I am not sufficiently so to know what the ordinary use would be). The only evidence directly is what one of these manufacturers and dealers in such things and familiar with them (I don't remember his name) said; he said the gasometer was used to store the gasoline or benzine, or whichever was used in it. That is all the direct evidence I call to mind on that subject. Still, I submit it to you to say, on the whole, what you think the fact is in this view."

MATTHEWS, J.

The first question to be examined is whether the circuit court erred in withdrawing from the jury the right to consider the facts proven as to the drawing of the oil in the oil-room after dark in the vicinity of a lighted lamp, which was the admitted cause of the fire, as constituting a defense to the action under the pleadings.

The tenth paragraph in the answer, setting up a separate and distinct defense, recited two conditions in the policy; the first, that the assured should not keep any burning fluid without written permission in the policy; the second, that kerosene, carbon oils of any description, whether crude or refined, or any other inflammable liquid,

"are not to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on this policy, excepting the use of refined coal, kerosene, or other carbon oil for lights, if the same is drawn and the lamps filled by daylight; otherwise this policy shall be null and void." It then alleged a breach of these conditions, in substance as follows: that without the written permission of the defendants, indorsed on said policies or otherwise, there were stored, used, kept, and allowed on the insured premises, benzine or benzole, or other inflammable burning fluids or liquids, prohibited by said policies, and that the fire referred to in the complaint originated therefrom and was caused thereby.

It is true that the answer does not specifically set out as part of the defense that kerosene was kept on the premises to be used for lights, but that, in breach of the condition which permitted such use, it was drawn after dark and with a lighted lamp near; but the right to keep it and use it in the manner specified in the condition is an exception from the general prohibition, which forbids the mere keeping of it without written permission; so that, strictly speaking, an averment that the article was kept and used on the premises, in violation of the condition, includes the use of it, otherwise for lights, and the drawing of it otherwise than by daylight. Under the allegations of the answer, although not so definite and certain as might have been required, upon motion made in due time, it seems to us it was competent for the defendant to prove and rely upon any keeping and use of burning fluid prohibited by the conditions set out.

Whatever obscurity there was in pleading the defense, considered apart from the facts subsequently disclosed in evidence, nevertheless, all the testimony necessary to its establishment was offered and admitted without objection. It was offered and admitted as tending to prove that there had been a breach of the conditions of the policy; and the whole matter of the defense was covered by the testimony, on examination and cross-examination of the witnesses, both on the part of the defendant in chief and on that of the plaintiff in rebuttal. On the conclusion of the testimony on both sides, the matter now insisted on was specially called to the attention of the court by a request on the part of the defendant's counsel to direct a verdict for the defendant on that ground alone, when, if it was a matter of surprise to the opposite party, opportunity for meeting it might still have been given; or, if the pleadings were considered not to be suf-

ficiently explicit, an amendment might have been required and made. The request was refused, and it does not appear from the record to have been on the ground that the defense was not within the issues; but the refusal was absolute and unqualified. We refer to it not for the purpose of intimating that the court was bound to grant the request, but because we think the matter ought to have then been either submitted to the jury or put in shape for such submission, if the rights of the adverse party required any change in the pleadings, or opportunity for the production of other evidence. By the course actually taken the defendant was deprived of the benefit of a defense, legitimately arising upon the evidence actually in the case, admitted without objection; and this, we think, was contrary to the practice as established under the laws of New York, as appears from the cases cited of *N. Y. Cent. Ins. Co. vs. Nat. Protection Ins. Co.*, 14 N. Y., 85; *Williams vs. Mech. & Traders' Fire Ins. Co.*, 54 N. Y., 577; and *Williams vs. People's Fire Ins. Co.*, 57 N. Y., 274.

The New York Civil Code of Procedure, which furnishes the rule of practice in such cases, is explicit on the point. In sec. 539 it is provided that "a variance between an allegation in a pleading and the proof is not material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. If a party insists that he has been misled, the fact and the particulars in which he has been misled must be proved to the satisfaction of the court. Thereupon the court may, in its discretion, order the pleading to be amended upon such terms as it deems just." And sec. 540 declares that, "when the variance is not material, as prescribed in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs."

There are other errors, however, in the charge to the jury, equally fatal to the judgment, which, as the case must be remanded for a new trial, it becomes important to point out.

The circuit court charged the jury, in substance, that it was not a breach of the conditions of the policy if they should find a half barrel of benzine was stored by direction of Walker in the oil-room, unless they should also find that he acted by the express or implied authority of the assured; that is, unless in doing so he was acting in the management of the property as the agent of his wife, and within the limits of the authority conferred upon him for the purpose of managing the property according to the terms and purposes of her tenancy, and accordingly the jury was told that if he had brought

the prohibited article on the premises, not for the legitimate use of the hotel, but for an outside purpose, it constituted no defense. The outside purpose referred to was suggested by some testimony, that the benzine was brought for the purpose of being used in lighting an adjacent grove for a picnic. Whether this use was for the entertainment of the guests of the hotel, or to attract custom, does not appear from the evidence; but, in any view, we think the construction of the policy, on which the charge to the jury was based, was erroneous.

One of the conditions of the policy is, that if the assured shall keep or use any of the prohibited articles without written permission, it shall be void; another, is that the articles named "are not to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on the policy," etc.

A violation of these prohibitions by any one permitted by the assured to occupy the premises, is a violation by the assured himself. The company stipulates that it will not assume the risk arising from the presence of the articles prohibited, and if they are brought upon the premises in violation of the policy by one in whose possession and control the latter have been placed by the insured, he assumes the risk which the company has refused to accept. In our opinion the defendant in error was chargeable with the acts of Walker if he brought upon the insured premises and stored in the oil-room any of the prohibited articles, although they were not intended to be used on the premises, but for lighting a neighboring grove for a picnic. Walker was in no sense a stranger or a trespasser. With his wife he was in the lawful occupation of the premises, and, with the implied assent of the insured at least, was entrusted with the control and management of them. And under the terms of the conditions in this policy, it must be held that the insured shall suffer the consequences of Walker's acts in doing that which, if done, the company had stipulated that they would not be liable. The insured engaged that the prohibited thing should not be done, and when he committed the control of the insured premises to another, the latter became his representative, for whom he must answer as for himself.

This construction of such a condition is well supported by authority: *Kelley vs. Worcester Mutual Fire Insurance Company*, 97 Mass. In this case it was held that "a policy of insurance obtained upon a building by the owner, and containing a proviso that it shall be void if the building shall be occupied or used for unlawful pur-

poses, is avoided by a tenant's use of the building for an unlawful purpose, even if without the owner's knowledge." In distinguishing the case from those cited by counsel adversely, the court said: "In some of the cases cited for the plaintiff the prohibited use was not so constant, or habitual, or of such a nature as to fall within the terms of the provision, and in the others the knowledge or assent of the assured was expressly required in order to avoid the policy."

In New York it has been the settled law since the case of *Duncan vs. Sun Fire Insurance Company*, 6 Wend., 488. In *Mead vs. Northwestern Ins. Co.*, 7 N. Y., 530, it was said, in such a case: "It is equally unimportant that the respondent was ignorant that such business was carried on; the question whether a warranty has been broken can never depend upon the knowledge or ignorance or intent of the party making it, touching the acts or the fact constituting the breach:" *Matson vs. Farm Buildings Ins. Co.*, 73 N. Y., 310.

In *Fire Association vs. Williamson*, 26 Pa. St., 196, the Supreme Court of Pennsylvania said: "Neither is it material that the landlord did not know that his tenant kept gunpowder. His contract with the insurance company was that it should not be kept without permission, and it was his business to see that his tenants did not violate the contract in this respect:" *Diehl vs. Adams Co. Mutual Ins. Co.*, 58 Pa. St., 443; *Howell's Ex'rs vs. Baltimore Equitable Society*, 16 Md., 377.

The circuit court also erred in the charge to the jury, that, under the circumstances disclosed by the evidence, it was no breach of the conditions of the policy to have in the oil-room a quantity of gasoline, although not intended for use in the gas apparatus, the use of which had in fact been discontinued, if the oil-room was a place where such fluid might have been properly stored, when intended for use in the apparatus.

The only direct evidence in the case as to the usual and suitable place for the keeping of gasoline when used in such an apparatus, was, that it should be deposited at once in the apparatus itself, one part of which is a generator where atmospheric air is carbonized by being forced through the gasoline. But waiving any question on that point, it is clear that the privilege indorsed on the policy, in the following terms: "to use gasoline gas, gasometer, blower, and generator being underground about 60 feet from main building in vault. No heat employed in process;" did not sanction the keeping, using, or storing of gasoline, or its equivalent, burning fluid or

oil, except for actual use in that gas apparatus. There is no express permission to keep gasoline given in the words of the privilege. Such permission is implied only when and because the use of gasoline is necessary to the enjoyment of the privilege. Otherwise and for all other purposes and uses, it is expressly prohibited. The implication cannot be extended beyond the necessity for a fair and reasonable exercise of the privilege granted.

But the evidence on the trial was uncontradicted, that at the time of the fire and for nearly a year previously the use of the gas apparatus had been discontinued. The plaintiff below himself testified that it was not used during the season of 1879, and that its use had been purposely discontinued. And the privilege indorsed on one of the policies "to use kerosene oil for lights, lamps to be filled and trimmed by daylight only," and "to keep not exceeding five barrels of kerosene oil on said premises," was dated September 17, 1878, at the time when, according to the testimony of the plaintiff, the use of the apparatus for lighting the premises by means of gas from gasoline ceased at the end of the season of 1878.

It is, of course, not to be denied that this did not supersede the privilege to use the gasoline apparatus, and that this privilege had not been otherwise exhausted or withdrawn. The insured had the right at any time to resume its exercise, and, in doing so, would have been justified in obtaining, keeping, storing, and using, in the accustomed manner, the necessary quantity of gasoline for supplying it. This is implied in the grant of the privilege. But if the privilege itself is not actually exercised, no such implication arises, and the prohibition against gasoline, according to the terms of the condition, must have full effect. It was error, therefore, in the court to instruct the jury that the naked privilege to use a gas apparatus, not actually exercised, nor intended to be exercised, but in fact abandoned, justified the insured in keeping and storing gasoline, in any quantity, in any place, or for any time.

The judgment of the circuit court is, therefore, for these reasons reversed, and the cause is remanded, with directions to grant a new trial.

COURT OF APPEALS OF NEW YORK.

EMELINE BOGARDUS, *Appellant*,

vs.

NEW YORK LIFE INS. CO., *Respondent*.*)

provision requiring the premiums to be promptly paid under condition of forfeiture, is lawful, and without the allegation of performance or its equivalent no good cause of action will exist against the company. The alleged non-performance of certain independent conditions by the company, is not equivalent to an alleged performance by the insured or an excuse for non-performance, except when such non-performance by the company is a condition precedent, or when it wholly refuses, or is disabled from performing.

Alleged neglect on the part of the company to keep separate and invest funds which were subsequently to be returned in dividends according to a stipulation in the policy, is no excuse for a refusal to pay the stipulated premiums.

A Tontine fund, from its very nature, cannot be separately kept and invested in respect to the interests of each individual member. It is enough that the respective rights and interests of the members are kept account of, and separation of the funds is not essential to this end. The insured is only entitled to an accounting at the end of the Tontine period.

Alleged representations prior to the issue of the policy and not of the nature of a warranty or of a valid contract will not excuse non-payment of premium.

RUGER, C. J.

The appellant asserts in his brief used on the argument that the count of the complaint demurred to states a cause of action *ex contractu* alone, and we are also of the same opinion.

It is essential to the legal statement of such a cause of action that it should show an existing contract and the performance by the plaintiff of such conditions precedent as are thereby provided, or a tender of their performance, or some adequate excuse for non-performance. This may be done by a general allegation of per-

*) Decision rendered, January, 1886.

formance, but in some form the fact must be alleged, and if controverted, proved on the trial. Code Civil Procedure, 533.

The cause of action stated in this count is for an alleged breach of the conditions of a policy of insurance dated November 2d, 1871, and which purports to have been issued by the defendant to the plaintiff upon the life of her husband, and is stated to be in consideration of the sum of three hundred and seventy-seven dollars and forty-five cents to them in hand paid, and of the annual premium of three hundred and seventy-seven dollars and forty-five cents to be paid "in every year during the continuance of this policy until ten full years' premiums shall have been paid." It further provides that "If the premiums as above stipulated," shall not be paid, "then and in every such case this company shall not be liable for the payment of the sum aforesaid, or any part thereof, and this policy shall cease and determine." "In every case when this policy shall cease and determine or become null and void, all payments thereon shall be forfeited to this company, and no action or right of action shall remain to or be maintained against the company by the assured, or by any other person by virtue of this policy or of anything connected therewith;" "that this policy is issued on the ten-year dividend system," and "that the ten-year dividend period for this policy shall be completed" on the 3d day of November, 1881; "that no dividend shall be allowed or paid upon this policy unless the person whose life is assured shall survive until the completion of its ten-year dividend period, and unless the policy shall then be in force." The complaint alleges payment of the annual premium stipulated for only to the 3d day of November, 1879, and this action was commenced on the 28th day of January, 1881, nearly a year before default could be made in the payment of dividends on the insurance, and more than a year after the policy had ceased to be an existing contract, unless some adequate reason is alleged for the non-payment of premiums by the plaintiff.

The contract as pleaded provides for the regular payment by the assured of the annual premiums, and such payments are made the condition of any claim thereunder, and the non-payment of such premiums causes the policy to become null and void, and forfeits to the company all payments made thereon. These conditions were lawful; the parties were competent to enter into them, and unless performance or its equivalent is alleged, the plaintiff has failed to state a good cause of action, and must abide by the case as shown by her complaint.

The statement in the complaint with reference to the payment of the annual premiums is equivalent to an admission that they were not paid after November, 1879, and it contains no allegation that she was in any way prevented by defendant from performing, but it is now argued that the alleged non-performance by the defendant of certain obligations alleged to have been assumed by it may be considered as equivalent to an allegation of performance by her. We are very clearly of the opinion that his claim is not substantiated by the terms of the contract at the allegations of the complaint. The failure of one party to a contract to perform some of its obligations, when it consists of a number of independent provisions, furnishes no excuse for non-performance to the other party. It is only when the non-performance is of a condition precedent or where such party has wholly refused to perform, or has wholly disabled himself from completing a substantial performance, that the other party is relieved from performance or a tender thereof: *People vs. Empire Mut. L. Ins. Co.*, 92 N. Y., 109; *Shaw vs. Republic L. Ins. Co.*, 69 N. Y., 293.

The complaint alleges the obligations of the defendant which it charges were not performed by it in the following language: That by the contract or policy of insurance issued to her as aforesaid, a copy of which is hereto annexed, the defendant then and there bound itself to receive and keep separate all the premiums paid upon policies of the same class to which her policy belonged as aforesaid, and to keep as a separate fund all the incomes, profits, and accumulations that should accrue therefrom, or upon policies of the insured in such class and to add thereto as forming part of, and in addition to the fund so created for said class to which the plaintiff belonged the shares of those members who should die during the ten years' dividend or Tontine period, the shares of those members which should become forfeited for any cause during said term, and all accumulations and profits belonging thereto, and to declare annual dividends of the income and profits so derived and to invest and re-invest from year to year the dividends so derived until the end of the ten-year dividend or Tontine period, and to hold the same in trust and then to divide the same to the survivors of the class to which the plaintiff belonged." The appellant's contention is that the defendants neglect to keep and invest separately the funds referred to, justified the plaintiff in her neglect to perform, and established a cause of action against defendant. The policy is annexed to and by the clause quoted is made a part of the complaint.

Assuming for the present that the facts alleged have been so pleaded as to entitle the plaintiff to urge them as an excuse for her admitted non-performance, we are brought to an inquiry as to their sufficiency for such purpose. This depends upon the considerations, (1) whether the complaint correctly describes the obligations assumed by the defendant; (2) whether the obligations in fact assumed by it constituted material conditions of the contract; (3) whether there is a sufficient allegation of the non-performance of them by defendant; and (4) whether their non-performance was the occasion of injury to the plaintiff. These questions must be determined by an examination of the policy and a consideration of its provisions.

In interposing the demurrer, the defendant did not thereby admit the construction put upon the contract by the pleading demurred to or the correctness of inferences drawn from the facts admitted, but only the truth of such facts as were properly stated therein: *Bonnell vs. Griswold*, 68 N. Y., 294; *Buffalo Catholic Institute vs. Bitter*, 87 N. Y., 250.

The contract itself having been set forth, the rights of the parties must be determined by the terms of that instrument as construed by the court. Reference thereto shows that the material obligations assumed by the defendant related to the payment to the assured, or in the event of her death, to certain other persons described, the sum of five thousand dollars upon the death of Abraham Bogardus, and (2) in case the said Bogardus survived for a period of ten years; and the said policy should continue in force until that time, the payment in cash or in annuity bonds to the said assured or upon her direction of a proportional share of the aggregate sum produced by the accumulations of dividends, accretions, and interest during the period of ten years from a fund to be created by certain contributions furnished by a class of policy-holders consisting of those who effected insurance on the Tontine plan during the year 1871; (3) that the surplus and profits derivable from certain described funds shall be equitably apportioned among the surviving policy-holders belonging to the class from which such funds are derived.

The obligations assumed in the policy are not changed or enlarged by the consent of the assured given in the application for insurance to the defendant to place all dividends accruing on her policy in a reserve fund. That provision merely waives the rights of the assured to demand the payment to her of any annual dividend to which she might be entitled. No express obligations are assumed

by the defendant either in the policy or by the application with reference to the management or investment of the funds in question, and the Tontine plan is referred to as a known and understood system of insurance pursued by all life insurance companies of a similar character to determine in a certain contingency the extent of the company's liability to a special class of its policy-holders. It contemplates the union of the interests of a large number of persons and the administration of a fund for their mutual benefit, and from its very nature is incapable of being moulded and managed to meet the special requirements of particular individuals. Upon the accession of any person to this class he becomes interested in the contributions of every other member, and neither of them can afterwards withdraw his contribution without injury to the rights of all others interested in the fund. It is the very nature of a corporate company carrying on the business of insurance that it should be subjected at indefinite periods to the payment of large expenses and the incurrence of large liabilities and risks, and their only resource for the satisfaction of such obligations consists in the fund created by the premiums paid to it by its policy-holders. This fund is necessarily subjected to drafts upon it for uncertain amounts at uncertain intervals and to require changes of its investments, and is incapable, either in its entirety or in any specific part thereof, of being kept invested and managed separately from all other funds.

We therefore think that the use of these moneys in connection with its other funds and their investment and management according to the mode which in the judgment of the defendant was best adapted to promote the interests of all of its policy-holders was entirely legitimate and in accordance with the true meaning of the contract. The Tontine plan undoubtedly contemplated such action on the part of the insurers as would enable them at the expiration of the ten years dividend period to determine the aggregate of such dividends, accretions, and interest, and to divide the same among the survivors of the class to which they belonged according to their respective rights therein; but it seems to us that it does not involve the necessity of keeping separate from its other funds either the premiums paid by such class, or their profits or accumulations, or the duty of separately handling, investing, or accumulating such funds.

The complaint does not allege that the defendant has failed to keep such an account of these funds as will enable it to determine their amount, and the respective shares of the participators therein; but the argument assumes that this is impossible unless they are

separately kept and invested. We do not think this is necessarily true. The method to be adopted by the defendant in managing the funds paid to it by its several policy-holders, was necessarily under the insurance laws of the State confided to its judgment, discretion, and skill, and the plaintiff has no cause for complaint in reference thereto, except in the event of the survivorship of Abraham Bogardus for ten years and the continued existence of her policy upon the happening of such event, and not until then she would become entitled to an accounting as to such fund.

No reason is alleged in the complaint why the rights of the respective parties entitled thereto are not determinable from the data kept by the company, and we are unable to perceive any insuperable obstacle to a proper accounting as to such moneys in the fact of an omission by the company to keep and invest them separately from its other funds.

It does not enlarge the liability of the defendant to the plaintiff to denominate the relations between them, those of trustee and cestui que trust, because if the defendant had any trust duty to perform in relation to such fund it was expressed in the policy, and was simply to receive, keep, and invest it carefully and prudently and so as to be able to divide it and its accumulations among those who should prove to be entitled thereto at the expiration of the prescribed period. We are therefore of the opinion that the policy did not require the defendant to keep and invest the funds referred to separately, and that no breach of its contract is stated in the allegation that it neglected to do so.

We are also of the opinion that even if an obligation to do so could be implied from the provisions of the policy, that it furnishes no excuse for the non-performance by the plaintiff of her contract.

The provision of the policy relating to an investment of the dividends upon the Tontine plan was simply an incident of the main object of the contract of insurance. It was entirely problematical whether there would be any increase of the fund or dividends upon the investment, or whether any claimant would live to realize his interest therein, and a failure in the performance of this part of the contract was of minor importance, and could not operate as an excuse for non-performance by the assured of her obligations. It is elementary that where agreements go to a part only of the consideration on both sides and a breach may be paid for in damages, that the promises are independent : 2 Pars. on Cont., 677.

There is no allegation in the complaint of the insolvency of the

defendant, or its inability to respond in damages for any breach of its contract. Its liability was purely a pecuniary obligation and capable of being fully performed by the payment of money or its equivalent. The method by which the Tontine fund was created and managed and designed simply as a means of determining the amount to which the policy-holder would be entitled in a certain event, and there is no difficulty in ascertaining such amount in the case of a breach by the defendant of the contract relating to the mode of managing the fund. For this reason also, we are of the opinion that the complaint does not allege a sufficient excuse for the non-performance by the plaintiff of the precedent conditions of her contract.

In considering the questions presented, we have not omitted to observe the claim made by the plaintiff, that the action can be sustained upon the theory of an agreement existing outside of the policy, and contracted simultaneously with it. This claim is attempted to be supported by importing into the count demurred to, the allegations of the first count purporting to state a cause of action in tort. We can hardly conceive a more incongruous or objectionable method of framing a cause of action, than that attempted in this case; but inasmuch as we are of the opinion that, even in that way, no cause of action *ex contractu* is legally stated, we refrain from criticising the method pursued.

The second count of the complaint states, that the plaintiff there "repeats and reiterates all the allegations hereinbefore contained, and makes them a part of this, her second cause of action." The allegations material to the question under discussion contained in the first count, are substantially as follows: That the defendant is a domestic corporation organized under the laws of the State of New York for the purpose of insuring lives, and that prior to the time of issuing the policy in question, it had done a large business in the various branches of life insurance, and through its officers and agents, for the purpose of inducing the plaintiff to take a policy from such company on the Tontine or ten-year dividend plan, represented that they were then doing business on that plan, and that it gave many and great advantages over the ordinary mode of life insurance. The count further proceeds to state that certain explanations as to the practical operation of the Tontine plan were made to the plaintiff; but the details of such explanations are not material in this connection. It then proceeds to state that the defendant, on the third day of November, 1871, issued its policy to the plaintiff

upon the life of Abraham Bogardus, for an insurance of \$5,000, on the ten-year dividend system of insurance, and in that connection avers that "the defendant then and there represented that it had received and kept separate, and would receive and keep separate, all premiums paid upon policies of the same class to which the policy" "of the plaintiff belonged," etc., and the further allegation that such representations were false and fraudulent, and were relied upon by the plaintiff in accepting the policy.

Assuming that these allegations are properly incorporated in the second count, they must be construed in connection with the allegations of that count; and if any inconsistency between the two is found to exist, the allegations contained in the second count must, for obvious reasons, be adopted as containing the statements intended to be relied on by the pleader. It will be observed that the second count also contains allegations referring to the representations made by the defendant; but they are there expressly referred to as having been made by the policy itself, while in the first count it is inferentially only that they are so stated.

It could very justly be held that the pleader did not intend by the reference in question, to repeat the allegations as to representations, or to incorporate in the second count allegations peculiar to an action of tort, and not pertinent and material to the cause of action there intended to be stated. While it was proper and necessary to the validity of the second count to incorporate therein the allegations referring to the organization of the company, and the execution and delivery of the policy in question, it was obviously unnecessary and highly objectionable to repeat therein the allegations intended to charge the defendant with the commission of a fraud.

It is not now claimed by the appellant that she is entitled to recover under the second count for any other cause of action, than one arising *ex contractu*, and in view of these circumstances it might well be said that the pleader did not intend to include in the second count any of the allegations of the first importing the commission of a fraud.

Being of the opinion that there are other reasons why the incorporation in the second count of the allegations of the first does not entitle the plaintiff to maintain a cause of action *ex contractu*, we refrain from disposing of the case on the grounds above referred to.

The first objection to the plaintiff's contention is, that assuming there were actionable representations made by the defendant to the

plaintiff, they were made at the time of and concurrently with the issuing of the policy, and were necessarily incident to and dependent upon the principal agreement of insurance thereby effected, and must stand or fall with the cause of action based thereon. The condition precedent of the regular payment of annual premiums by the plaintiff applies as well to the incidents of the contract as to its express provisions, and furnishes the same defense to an action based thereon as we have seen it does to the action on the policy. It must, of course, be borne in mind that we are now inquiring only whether the plaintiff has alleged in her complaint any sufficient excuse for omitting to pay the annual premiums. Secondly, we are also of the opinion that the statement contained in the first count does not show any actionable cause resting in contract against the defendant. It simply alleges that the defendant made certain representations as to its past and future conduct; but those representations were not alleged to have been a warranty, or to have been made under such circumstances, and in such form and manner as to constitute a valid contract. A mere representation made during the pendency of negotiations for a contract is not actionable *ex contractu* even if untrue. It must be alleged to have been material and made under such circumstances as to constitute a contract, and show it to have been intended as a warranty of the fact represented, to sustain such a cause of action: *Swift vs. Colgate*, 20 John., 196; *Ross vs. Mather*, 51 N. Y., 110; *Moore vs. Noble*, 53 Barb., 425. A warranty may be inferred from proof of a representation, but the naked allegation of a representation is not equivalent to an allegation of a warranty or a contract. A representation is simply evidence from which a contract may or not be inferred, and it is a fundamental rule of pleading under all systems, that the facts constituting a cause of action must be alleged, and not the evidence of such facts.

We are further of the opinion that the representation in question, is substantially the same as that alleged in the second count, and is not a material representation authorizing the plaintiff to omit the performance of the conditions assumed by her. This question has already been sufficiently discussed; and we conclude that, for the reasons stated, the judgment must be affirmed, and judgment absolute ordered for defendant.

All concur, except Miller, J., absent.

SUPREME COURT OF NEW HAMPSHIRE.

WHEELER

vs.

TRADERS' INS. CO.*

Where the policy is on "woolen mill and contents," parol evidence is admissible to show the nature of the contents; otherwise the insurance may be void for uncertainty.

The issue of such a policy, with knowledge of the fact that naphtha was necessarily used in the business, was a waiver of a printed condition that the policy should be void in case of its keeping or use.

SAMUEL C. EASTMAN, *for Defendant.*

MARSTON & EASTON, FRINK & BATCHELDER, *for Plaintiff.*

BINGHAM, J.

The motion for a nonsuit for want of sufficient evidence to warrant a finding of the facts claimed by the plaintiff was properly overruled. Evidence was introduced on each point, from several witnesses, tending to show the facts as claimed by him, and it cannot be said, as a matter of law, that the plaintiff was not entitled to have the evidence submitted to the jury: *Paine vs. Railroad*, 58 N. H., 611.

The motion for a nonsuit, because the facts appearing in the plaintiff's opening and proof did not make a ground of recovery, and the motion for a verdict, raise essentially the same questions. The facts were, in substance, that the action was assumptit on a fire insurance policy, which was made by writing, in a printed blank, that the defendants insured the plaintiff's woolen mill and contents in Salem, New Hampshire, against a loss by fire for one

* Decision rendered, July 31, 1885.

year. In the printed part of the policy was a stipulation that if the assured should keep or use naphtha, without permission in the policy, it should be void and the insurance cease. The plaintiff, within the year, used naphtha for killing moths, and after its use, through a fire not occasioned by it, the mill and its contents were burned. The plaintiff was a woolen manufacturer, doing business in the mill at the time of the insurance and loss, and the use of naphtha in the manufacture of woolen goods was necessary and customary, and the defendant knew of the usage. Its use for killing moths was necessary in manufacturing his goods and protecting his mill, and such use was customary among woolen manufacturers.

It is claimed that parol evidence was not admissible to show what constituted the contents of the mill.

It does not appear that this objection was specifically taken at the trial, except as it may be included in the one that there was no sufficient evidence to warrant the finding of the facts claimed.

The question, however, has been considered without reference to the form of the exception. It has no reference to the prohibitory clause of the policy, but relates entirely to the admissibility of the parol evidence.

The contents of the mill were insured, but if no resort to parol evidence can be had to ascertain what they were, this part of the insurance may be void for uncertainty. "Woolen mill and contents" is a general description which refers to extrinsic objects and circumstances that make it necessary to resort to parol evidence to prove the existence of the facts by which alone the property insured can be ascertained and identified. Such evidence is competent to enable an application of the policy to its subject-matter: *Gerrish vs. Towne*, 3 Gray, 82, 88; *Woods vs. Sawin*, 4 id., 322; 1 Greenl. Ev., §§ 286, 287, 288; *Webster vs. Atkinson*, 4 N. H., 21, 24; *Bell vs. Woodward*, 46 id., 315, 335; *Steinbach vs. Company*, 54 N. Y., 90; *Barnum vs. Company*, 97 id., 188, 192.

The evidence being properly admitted, it could be used for all legitimate purposes in the case, and the plaintiff claims that its effect is not to be limited to a mere enumeration or identification of the property insured, but is also to be used to aid in the construction of the policy in determining what comes within its true meaning, as understood and intended by the parties to it.

It appears by parol that the plaintiff was a woolen manufacturer, and at the date of the policy insuring the mill and its contents for one year, he was operating the mill in manufacturing a stock of wool

into woolen goods, with the intention that the same would not continue during the year. The jury has found that the use of naphtha in the manufacture of woolen goods was necessary and customary, and that the defendant knew of the custom; that its use for killing moths by the plaintiff was necessary in his business and was customary among manufacturers of woolen goods.

The fair construction of this branch of the policy is that the unmanufactured material, both before and during the process of manufacture, with the necessary articles customary in the process, and the cloths when manufactured into such articles as were necessarily and customarily used in the preservation of the material, and manufactured goods, were included in the description as they might exist at any time in the year, when a loss might occur. In fact, it might well be said to be an insurance of the mill and contents to be used in manufacturing woolen goods in the customary manner for one year. This was the apparent intention of the parties. The plaintiff had a woolen mill which he was operating, that he was intending to operate for the next year, and desired to get it and his stock insured. The defendant was an insurance company soliciting patronage, for the profit to be derived from the premiums. Now what was the understanding and intention of the parties in the description of the property in the policy? We think it was as above stated. In construing written instruments, the intention of the parties is sought, and to ascertain that intention, regard may be had to the nature of the instrument itself, the situation of the parties executing it, and the purpose they had in view: *Corwin vs. Hood*, 58 N. H., 401; *Houghton vs. Pattee*, *id.*, 326; *Bradley vs. Steam Packet Co.*, 13 Pet., 89, 98; *Swain vs. Saltmarsh*, 54 N. H., 9, 16.

There is no material difference of principle in the rules of interpretation between mills and contracts except what naturally arises from the different circumstances of the parties. The object in both cases is to discover the intention, and the court may in either case put itself in the place of the parties and see how the terms of the instrument affect its subject-matter: 1 Greenl. Ev., § 287. The interpretation of a mill is the ascertainment of the testator's intention: *Brown vs. Bartlett*, 58 N. H., 511; *Kimball vs. Lancaster*, 60 *id.*, 264.

The written description in the policy was sufficient to insure the contents of the mill, including the necessary articles customarily used in manufacturing and preserving the stock, when interpreted in the light of the circumstances surrounding its execution. But it is

said that, in the printed part of the policy, the use of naphtha is expressly prohibited, and that the policy is to cease and become void in case of its use without written permission in the policy. This claim makes it necessary to examine the policy further and find the meaning and intention of the parties, as expressed in both the written and printed parts of it, as to the use of naphtha. It is admitted that the plaintiff has been guilty of no fraud or bad faith, and it is not to be presumed that the defendant was, but on the contrary, it may be assumed that both parties acted in good faith to perfect an honest, practical insurance of the property as it existed and was operated. The loss was not occasioned by the use of naphtha, but from other causes, so that this branch of the defense is purely technical, an attempt to avoid an honest loss for a claimed violation of the policy that has done the defendant no harm. The jury has found that at the time of the insurance and loss, the use of naphtha in woolen mills for the manufacture of such goods as the plaintiff was making was necessary and usual, and that the defendant knew of this usage.

This being true, under the present claim of the defendant, the policy was substantially worthless to the plaintiff, he paid the premium for nothing and the defendant received it for nothing. The defendant understood it was the plaintiff's purpose to continue the business of manufacturing, and knew, if he did, he must necessarily use naphtha, and as necessarily avoid the policy. This shows, if the present claim is the correct one, that the defendant was not acting in good faith at the time it insured the plaintiff, for it is fair to assume that he supposed he paid the premium for a valuable and not a worthless insurance. It was not unlike a grant with a reservation of all that was granted. It was a policy with a condition that he would necessarily avoid it the moment the assured received it, unless he ceased the business of manufacturing in the mill. When the insurer names the premium for which he will insure property employed in any trade or business, it is presumed that he has in mind the nature of the understanding and the usual methods of doing the business, and, if he does not know it, it is his duty to inform himself, and he takes the risk on the understanding that what is usual or necessary will be done: *Pelly vs. Company*, 1 Burr., 341, 348; *Noble vs. Kennoway*, 2 Doug., 510, 512; *Company vs. Company*, 11 How., 108; *Steinbach vs. Company*, 54 N. Y., 90, 95; *Harper vs. Company*, 17 id., 194, 197, 198.

In this case the defendant's knowledge that the use of naphtha

was a necessity in the plaintiff's business does not depend upon presumption, but is found as a fact by the jury.

The blank policy in which the insurance was written contained many conditions upon which it was to become void. Among them was the one in question. These were for the benefit of the defendant, placed there before the negotiation commenced for the insurance, and no special consideration appears to have been given them, further than the filling of the blank with language which placed an insurance on property entirely inconsistent with the printed prohibition, and which, if the prohibition was intended by the parties to remain in force, rendered the policy worthless. The written special description of the particular subject-matter, wherever inconsistent with special clauses, must control: *May Insurance*, § 239. It has been decided in this State, that if the insurer has knowledge, at the time of the insurance, of the true state of the assured's title, it is a waiver of the condition in the policy making an inaccurate statement of the title an avoidance of the policy: *Thompson vs. Williams*, 58 N. H., 248; *Pierce vs. Company*, 50 id., 297, 300, 302; *Marshall vs. Company*, 27 id., 157, 168; *Carrier vs. Company*, 53 id., 539; *Company vs. Goodall*, 29 id., 182, 184, 196. *Campbell vs. Company*, 37 id., 35, was assumpsit on a policy of insurance. The property insured was in a building, in another part of which a small steam boiler was used. The application did not state this; if it had, the rules of the company would have prohibited the policy. It appeared that the company had no knowledge of the boiler, and it was held to be estopped from taking advantage of the defect in the application: *Barns vs. Company*, 45 N. H., 21, 23; *Appleton vs. Company*, 59 id., 541, 544; s. c., 47 Am. Rep., 220.

The doctrine of waiver, as asserted to avoid the strict enforcement of conditions contained in contracts, is only another name for the doctrine of estoppel: *Appleton vs. Company*, supra, 545, 546; *Hadley vs. Company*, 55 N. H., 110.

Company vs. McCrea, 8 Lea, 513; 41 Am. Rep., 647, was an action on a fire insurance policy, on a distillery, which provided that it should be void if the distillery should be run at night, and that "the use of general terms or anything less than a distinct, specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein." It was admitted that the distillery had always been run at night, and was so run before, at the time of, and after

the issuance of the policy, to the knowledge of the general agent of the company who delivered it, and it was held a waiver of the condition. This is a recent case, in which many authorities are cited, classified, and ably discussed. And it appeared in this case that at the time of the insurance the defendant knew the use to be not only necessary, but customary.

It seems to be well settled that the execution of a policy of insurance with full knowledge of existing facts, which, by its condition, render it void, is a waiver of the conditions, because otherwise it would be a fraud: *Van Schoick vs. Company*, 68 N. Y., 434; *Bennett vs. Company*, 81 id., 273; s. c., 237 Am. Rep., 501; *Woodruff vs. Company*, 83 N. Y., 133; *Company vs. Crane*, 16 Md., 269.

In this State, upon substantially the same principal, a policy conditioned to be void if the facts material to the risk are not correctly stated in the application, is not rendered void by the omission or misstatement, without fraud, of facts known to the insurer. In other words, the issue of the policy with knowledge of the facts is waiver of the condition.

The insurance of the plaintiff's property, with a knowledge of the necessary use of naphtha, was so utterly inconsistent with the condition against its use, that an intention to waive the condition must be presumed. To permit the defendant after a loss to set up the condition which, by issuing the policy, it induced the plaintiff to believe was waived, would be permitting a fraud. There is no reason why the doctrine of estoppel should not be applied: *Horn vs. Cole*, 51 N. H., 287; *Drew vs. Kimball*, 43 id., 285. It may be said that this doctrine denies to insurance companies the right to impose the conditions on which they will assume risks. This is a mistake. It is founded upon the rules of fair dealing and sound morality, and is in harmony with a healthy public policy. It simply provides that companies, if they desire to impose conditions upon the assured that are inconsistent with usages, incidents or nature of the risk, and the company's knowledge thereof, they must do so in clear and unmistakable terms, so that the assured shall not be misled or deceived as to the character of the contract or the protection it affords, or bound by inferences from the putting together of blind detached parts of the contract which he never in fact heard of and rightfully supposed the contrary thereof to be true: *Delancey vs. Company*, 52 N. H., 581, 587.

There are authorities to the contrary of this rule—*Company vs. Kroegher*, 24 Am. Rep., note, 153, 154—but the great weight of

authority sustains the view here taken: *Wood Ins.*, 338. The following are some of the many authorities bearing on this branch of the case: *May Ins.*, §§ 239, 240, 241; *Wood Ins.*, 839, 840; *Carlin vs. Company*, 57 Md., 515; s. c., 40 Am. Rep., 440, 445; *Company vs. McLaughlin*, 53 Penn. St., 485; *Company vs. Lewis*, 30 Mich., 41; *Moliere vs. Company*, 5 Rawle, 342; *Company vs. Bruner*, 23 Penn. St., 50; *Ayres vs. Company*, 21 Iowa, 185; *Company vs. Jones*, 62 Ill., 458; *Company vs. Schell*, 29 Penn. St., 31; 15 Am. L. Rev., 763; 3 Stark. Ev., 1,021, 1,033, 1,037; *Company vs. Kinniers*, 28 Gratt., 88; *Rathbone vs. Company*, 31 Conn., 193, 194; *Harper vs. Company*, 17 N. Y., 194; *Bryant vs. Company*, id., 200; *Harper vs. Company*, 22 id., 441; *Hall vs. Company*, 58 id., 292; *Buchanan vs. Company*, 61 id., 26; *Moore vs. Company*, 29 Me., 97, 101; *Lounsbury vs. Company*, 8 Conn., 459; *Sims vs. Company*, 47 Mo., 54; s. c., 4 Am. Rep., 311; *May vs. Company*, 25 Wis., 291; *Elliott vs. Company*, 13 Gray, 139; *Haley vs. Company*, 12 id., 545, 548, 551; *Pindar vs. Company*, 36 N. Y., 648; *Billings vs. Company*, 20 Conn., 139; *Whitmarsh vs. Company*, 16 Gray, 359; *Viele vs. Company*, 26 Iowa, 9; *Archer vs. Company*, 43 Mo., 434; *Company vs. Kroegher*, 83 Penn. St., 64; s. c., 24 Am. Rep., 147, note, 150; *Collins vs. Company*, 79 N. C., 279; s. c., 28 Am. Rep., 332; *Carrigan vs. Company*, 53 Vt., 418, 425; *O'Neil vs. Company*, 3 N. Y., 122, 126; *Steinbach vs. Company*, 54 id., 90.

The evidence received of the use of naphtha in woolen mills for other purposes than killing moths was unobjectionable. Many of the cases on this subject show the admission of similar evidence.

The question of the regularity of the verdict was decided at this term in *Dearborn vs. Newhall*, ante, in which the doctrine of *Nims vs. Bigelow*, 44 N. H., 376, is approved.

Judgment on the verdict for the plaintiff.

Doe, C. J., and Smith, J., dissented; Allen, J., did not sit; the others concurred.

SUPREME COURT OF NORTH CAROLINA.

OCTOBER TERM, 1885.

SARAH A. DUPREE
vs.
VIRGINIA HOME INS. CO.)

Where a firm are general agents for two insurance companies, and issue a policy for one of them upon an application after an examination by a sub-agent of that company, and after the expiration of that policy insure the same property in the other company, at a higher valuation and upon another application, it is competent in an action upon the last policy to show the first application and examination, although the sub-agent did not communicate the result of his examination to the general agents, as tending to rebut the charge of fraudulent overvaluation.

After the defendant has closed his case, and the plaintiff introduces a witness upon a material point, and is cross-examined, the defendant cannot contradict or impeach him as of right in respect to a statement that he had testified the same way on a former trial, and had contradicted a witness since deceased.

A new trial upon the ground of after-discovered testimony will not be granted unless:—

The newly discovered witness will probably testify as alleged.

The evidence is material.

The evidence is probably true.

The party has used due diligence in discovering it.

It is independent, and not merely cumulative.

LEWIS and SON, and ARMISTEAD JONES, *for Plaintiff.*

D. G. TOWLE, G. H. SNOW, J. DEVEREUX, and J. W. HINSDALE, *for Defendant.*

SMITH, J.

The argument upon the rehearing of the errors assigned, protracted over the entire period allowed by the rule, has been little more than the reproduction of that made upon the first hearing, which was full and exhaustive, upon the numerous exceptions con-

tained in the record, both orally and in brief. With their aid the case was then in all its details carefully considered and decided. Our convictions produced by that discussion, and our own examination of the authorities, as embodied in the opinion, then formed and delivered, remain unchanged. We do not feel called upon to go over the same ground a second time to sustain the conclusions then reached, but shall, notwithstanding they have been called in question and assailed with an earnest confidence of counsel, leave their correctness to the vindication furnished in the opinion. To do this in the absence of any important overlooked case adjudged in the courts, or contained in any recognized elementary work, or any shown misconception of the facts, at the instance of dissatisfied counsel, against whose client the decision is made, and whose zeal does not admit of the calm, dispassionate consideration that belongs to the judicial mind, would be to write a revision of the rulings of the court, and impair confidence in them. Nor are such contemplated in the rule that under limitations allows no application for a rehearing of a decided cause, as was said with great force by the late eminent chief justice delivering the opinion in *Watson vs. Dodd*, 72 N. C., 240; and reiterated in subsequent cases. No case ought to be reheard upon petition to rehear, unless it was decided hastily, and some material point was overlooked, or some direct authority was not called to the attention of the court: *Hicks vs. Skinner*, 72 N. C., 1; *Devereux vs. Devereux*, 81 N. C., 12; *Haywood vs. Davis*, *id.*, 8.

While we are ready and willing to correct any error which may have been committed, and will do so, when it is pointed out and made to appear, it is not in the contemplation or scope of the rule to permit an adjudged case to be reviewed, and the rulings made therein controverted by the same course of reasoning and the reproduction of the same authorities, which were relied on in the former argument, and then with due and careful deliberation considered and disposed of.

We shall not, therefore, go over the entire ground covered by the present argument, and re-examine, as was done before, the nineteen enumerated errors, set out in the defendant's petition, many of which present the same substantial proposition in modified forms; but we will confine ourselves to the two most prominent, in what we have now to say. These objections are, first, to the admission in evidence of the report of the agent who made the examination upon which the first insurance was effected, and secondly,

to the refusal to allow the defendant to introduce witnesses to falsify the statements of the witness Dupree elicited upon his cross-examination by defendant. The report of the agent to the general agents of both insurance companies, Cameron, Hay & Co., sent out to inspect the premises.

Among the defenses set up in opposition to the plaintiff's demand of indemnity for the loss occasioned by the fire, is an averment that the execution of the policy was superinduced by the false and fraudulent representation of the value of the property made in the plaintiff's application for insurance, which vitiates and avoids the contract. In meeting this imputation, the plaintiff was allowed to show that an employe at the instance of the general agents, Cameron, Hay & Co., had made an examination and report of the premises the year before, upon which an insurance was effected in another company, they being agents of both principals, and that with this information they issued the policy upon which the present action is founded. The agency firm consisted of three members, one of whom, particularly conversant with the transaction, retired before the present policy was issued.

It was certainly competent to show this source of information possessed by the agency firm in regard to the property included in both policies, when they issue the last one, as tending to rebut the charge that it was solely brought about by the fraudulent statements contained in the plaintiff's application.

This agency may be understood, at least the evidence tending in this direction was proper to go to the jury to have acted alike upon this information, as upon that furnished by the plaintiff when each of the policies were issued.

We were referred to the case known as the *Distilled Spirits* in 11 Wall., 356, where it is supposed a contrary doctrine is maintained. So far from this, in our opinion it sustains our view. Mr. Justice Bradley there says: "That in England the doctrine now seems to be established that if the agent at the time of effecting a purchase, has knowledge of any prior lien, trust, or fraud affecting the property, no matter when he acquired such knowledge, his principal is effected thereby. He then adds, "on the whole, however, we think that the rule as finally settled by the English courts, with the qualification above mentioned" (referring to information confidentially acquired, and which public policy does not permit to be disclosed), "is the true one, and is deduced from the best consideration of the reasons on which it is founded." We have not undertaken to give

any specific effect to the evidence, but only to disclose that it was proper to be heard by the jury.

But it was urged that the trial judge, in his charge, gave an unwarranted force to the evidence in telling the jury that "the witness may be considered as determining the value of the other articles insured, but not as to the value of the merchandise," which had not passed under his inspection

This literal rendering of the words of the judge does not, most assuredly, convey his meaning as he must have been understood.

He evidently intended to say, and this in harmony with what precedes, that the jury might consider the evidence in determining the value of that property. In the beginning of the sentence of which the words quoted are the conclusion, his words are: "In determining the value of the property insured, the jury may consider and give such weight as they deem proper to the testimony offered to show that the firm of Cameron, Hay & Co. were during the years 1878 and 1879, agents both of the defendant company and the Virginia Fire and Marine Insurance Company that issued the policy offered in evidence in July, 1878, and that an agent acting under the direction of said firm, inspected and estimated the value of the storehouse, and other articles insured in the policy sued on at the prices set forth in the policy issued in 1879, and made out the application," etc. This language clearly shows that the judge meant to leave, and was so understood, the force and effect of the evidence to the jury, untrammelled in acting upon it.

The next assigned error is in the refusal of the judge, the taking of testimony on both sides being concluded, to allow the defendant to introduce a witness to contradict what had been sworn by P. C. Dupree as witness for the plaintiff, upon his cross-examination by the defendant. He had testified in opposition to the reproduced testimony of a deceased witness for the defendant who had been examined at a former trial, that he never had any conversation with the plaintiff about the cost of her house. In answer to a question from defendant, he stated that his own and the testimony of the deceased witness at a former trial were in conflict. The proposal now was to show that there was no such conflict. The court refused to let the witness be examined, because the statement to be disproved was not elicited by the plaintiff, but was in response to inquiry from the defendant, and that the matter rested in the sound discretion of the court.

The ruling was wholly misapprehended by the defendant's coun-

sel upon the first argument, as shown in his elaborate and carefully prepared brief. The court is represented as holding that the testimony being brought out on the cross-examination, the witness could not be impeached or contradicted, and again that it was not within the discretion of the court to allow the question, and the argument proceeds to combat these supposed rulings and to show that "the conduct of the trial and the order of proof is always under the discretionary control of the court.

The court did not so rule, and held according to the well-settled practice, the defendants having closed its case, had only a right to contradict, by calling other witnesses, what was brought out in the plaintiff's replying evidence, and to impeach the new witness who testified, and this because no previous opportunity to do this had been afforded. The witness Dupree had been before examined, and his testimony was simply in conflict with that of the deceased witness.

It is an inaccurate statement of the ruling upon the exception. It was not held in general terms, as the argument assumes, that the testimony of Dupree was not open to disproof, for it undoubtedly was during the orderly examination of the witnesses. The point decided is that where both parties have been heard, and the defendant's witnesses have all been examined, only facts brought out in the plaintiff's reply to the evidence adduced by the defendant are open to refutation, and not such as the cross-examination may elicit. Beyond this the application must be addressed to the discretion of the judge, the refusal to exercise which, is not a matter for review here. If it were otherwise, the plaintiffs could have the right to call witnesses to sustain witness, and thus a new and collateral issue be opened up, and the trial indefinitely prolonged. Hence the rules to be relaxed only when in the opinion of the presiding judge it was right and proper to do so: *State vs. Lennon*, 92 N. C., 790.

In regard to this alleged error, the remark may be repeated that no overlooked material authority has been cited, and no aspect of the matter before unnoticed has been presented to us. The entire reasoning of counsel has been directed against the conclusions before reached, and in controverting the principles of law then laid down. This is aside from the purview of the rule for rehearing, and if allowed would tend to unsettle confidence in an adjudication of the court as a final arbiter in disposing of controversies.

The facility with which our most carefully prepared adjudications

and opinions are often pronounced erroneous in certificates of members of the bar sustaining the application for a rehearing and review, has made it necessary to place further restrictions upon the practice and render it what it was intended to be, a mode of correcting inadvertences, or propositions of law announced in ignorance of some important case, which, if known, would probably have changed the result: Rule 12, sec. 2.

After argument heard upon the second ground assigned, in support of the application for a new trial, the discovery of new material evidence since the trial in the superior court, we resume the examination of this part of the case.

The witness from whom the testimony is expected to be obtained, J. J. Whitehead, the agent who received the plaintiff's application for insurance on July 18, 1878, and handed it to E. E. Gray, one of the partners in the general agency of Cameron, Hay & Co., with his indorsed approval, was first summoned for the plaintiff, but not examined on the first trial, and his attendance dispensed with at the last. His affidavit is, that he filled the blanks in the application at plaintiff's dictation, and was guided entirely by her valuations and figures, and "that she did not carefully examine the buildings or the furniture" embraced in the policy which issued in response; and when he delivered the application to Gray, "giving him no information whatever concerning the same, or the property described, or even of the fact that he had been in the house.

It appears that the other partners never had any conversation with him on the subject-matter in controversy, nor was the retiring partner Gray conferred with in reference to the defense, while the application upon which he issued the policy for the firm remained in the possession of the other partners open to their observation, until produced for the trial.

Certainly, the failure to see and ascertain from the agent what information he possessed, and what aid his testimony might render to the defense, is not consistent with that diligence which ought to be exercised when the court is asked to annul the trial and take away the results secured by the successful issue to the plaintiff.

It is not necessary to go outside the adjudications in this State to deliver the conditions requisite to the interference of the court in cases of this kind.

The considerations that would enter with the determinations of the court on such an application, are thus set out by Rodman, J., in *Holmes vs. Goodwin*, 69, N. C. 469:—

1. Will the newly discovered witness testify as alleged?
2. Is the new evidence material?
3. Is it probably true?
4. Has the party used due diligence in discovering it?—to which may be added, is it independent, or cumulative merely?

Without commenting on the other indispensable conditions, has the applicant used diligence in finding out the witness, and what he will prove? Unless this appears, the motion will be refused in the court where the jury trial was had. But a more stringent rule ought to be applied to an application made in this the appellate court.

It is said by Reade, J., delivering the opinion in *Shehan vs. Malone*, 72 N. C., 59; whereas in *Bledsoe vs. Nixon*, 69 N. C., 81, the application upon such ground was first made in this court. "There is but one precedent for a motion in this court after judgment there to set aside the judgment here, and grant a new trial in the court below for newly discovered testimony, and that is the case of *Bledsoe vs. Nixon*, supra. The necessity for it seems to arise out of our new system. It is an inconvenient practice, and not to be encouraged, nor will it be allowed except in cases of necessity, to prevent manifest injustice.

Without a discussion of the cases, we refer to *Matthews vs. Joyce*, 85 N. C., 258; *Carson vs. Dillinger*, 90 N. C., 226, and *Simmons vs. Mervin*, 92 N. C., 12; the last judicial utterance on the subject.

There have been two jury trials of this cause in the superior court, two hearings upon the appeal, inclusive of the present rehearing, and now we are asked to re-open the cause, and send it down for a new trial before the jury, for the only assigned reason that the defendant's agents never conversed with the witness most likely to give information about the manner of affecting the first insurance, never knew the value and importance of his testimony, until since the last trial in the superior court. Under such circumstances, we do not feel warranted in unsettling what has been done, and we refer to that most salutary maxim, *Interest reipublicæ ut sit finis lititium*. It is full time for this litigation to come to an end, and the judgment must stand.

COURT OF APPEALS OF NEW YORK.

GRIFFEY

vs.

NEW YORK CENTRAL INS. CO.*

A notice to the insured to return the policy for cancellation, upon which the ratable proportion of the unearned premium would be paid, does not effect a cancellation where the policy provides that it may be canceled upon notification and refunding such unearned premium.

What is due diligence in complying with a provision requiring notice of loss forthwith, is a question of fact for the jury.

The transfer of a policy as collateral security for claims against the insured is not a violation of a prohibition against a transfer or change of title or an assignment of the policy before a loss.

On the 18th day of December, 1878, the plaintiffs were insured by the defendants against loss by fire, on certain described property. They also held policies of like character issued by other companies, to the amount, including the one in question, of \$16,000. On the 26th of February, 1879, they delivered to the Lewisburg National Bank all the policies and a written instrument of which, so far as is material, the following is a copy:—

"We hereby transfer the following insurance policies, amounting to \$16,000, to the Lewisburg National Bank, as collateral security for claims said bank holds against us, and that in case of loss by fire, to any of our properties, insured in the following companies, shall be payable to said Lewisburg National Bank, as their claim against us may appear," naming the policies referred to. The consent of the defendant was not indorsed upon the policy, nor does it appear

* Decision rendered, November 24, 1885.

to have been given or asked for. The property was damaged by fire in August, 1879, and afterward, but before suit brought, the claims of the bank were paid in full by the plaintiffs, and the policies with the written transfer returned to them.

The defendant alleged by its answer, (1) that the policy was canceled by it before the fire; (2) that it was assigned without their consent; (3) that notice of the fire and proofs of loss were not given in pursuance of the terms on which the policy was issued.

Upon the trial it appeared that the policy contained the following provisions: "If the insured property be sold or transferred, or any change take place in title or possession, except by succession, by reason of the death of the insured, whether by legal process or judicial decree, or voluntary transfer or conveyance, or if the property shall hereafter be incumbered by judgment or otherwise, or if this policy shall be assigned before a loss without the consent of the company indorsed hereon, then and in every such case this policy shall be void. This insurance may be terminated at any time at the request of the assured, in which case the company shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time, at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of this policy. Persons sustaining loss or damage by fire shall forthwith give notice of said loss, and within thirty days thereafter deliver to the company a particular account of such loss, signed and sworn to by them," etc., requiring what is commonly called "proofs of loss."

On defendant's motion for nonsuit the trial judge decided that the first and second defenses were not maintained, and submitted the other to the jury, who found in favor of the plaintiffs. Judgment in their favor was duly entered, and upon appeal affirmed by the general term.

W. E. HUGHITT, *for Appellants.*

REYNOLDS & COLLIN, *for Respondents.*

DANFORTH, J.

It may be conceded that the defendants notified the insured before the fire, of a desire to cancel the policy, but there is no evidence that any proportion of the unearned premium was paid back; on the contrary, the defendants only proposed to do this after the policy should be returned by the insured. They had no right to impose that condition, nor could they require the insured to take

any step in the matter. The option to cancel was reserved, but to be exercised by "notice, and refunding a ratable proportion of the premium for the unexpired time" of the policy. What the defendants did was to ask the insured to return the policy for cancellation, promising in that case "to remit to them the return premium." This was not enough. Notice of cancellation and actual payment or tender of the sum due could alone suffice: *Van Valkenburg vs. Lenox Fire Ins. Co.*, 51 N. Y., 465. Under the provision of the policy requiring notice of loss to be "forthwith" given, it was enough for the insured to act in that matter with diligence, and without unnecessary delay. It was, therefore, properly left to the jury to say whether, in view of all the circumstances of the case, the notice actually given was sufficient. It was not instantaneous, but the delay was brief. Among other things, it appeared that the fire occurred on the 30th day of August. The bank gave notice of it on the 1st of September, and on or before the 4th of September the assured also notified the defendants of the fire and loss. Even this delay was accounted for. Sunday intervened, and during the other days the assured was busy with the adjusters of different insurance companies concerned in the loss, and with matters connected with the fire. The jury might properly, in view of these and other things in evidence, find that the delay was not unreasonable. The question at least was for them.

The other point made for the appellant rests upon the claim against "assignment" of the policy. It entails a forfeiture, and must, therefore, receive a strict construction. Hence, no other meaning can be given to the language used, than a most rigid and literal interpretation permits, and, as the condition is a limitation of liability, it cannot be extended by interpretation so as to include a case not clearly within the words: *Rann vs. Home Ins. Co.*, 59 N. Y., 387. So, if the words are of doubtful meaning, or susceptible of two fair interpretations, they should be construed to uphold rather than avoid the policy: *Hoffman vs. Aetna Ins. Co.*, 32 N. Y., 405. In the first place, it is apparent that nothing but an effectual assignment or transfer will come within its terms. In this sense the policy was not transferred. No interest in the insured property was conveyed, but it all remained as before. In case of loss, therefore, the transferee could not recover, not only because it had suffered no loss and was not a party to the contract, but because the transfer of the policy was not accompanied with any interest in the subject of insurance. The clause in question, although of several members,

is in itself single, and is aimed against the sale or transfer, or any change in title or possession of the insured property, and the assignment of the policy, which it prohibits, is in connection with the events which affect the ownership of the things insured. They must be construed together, otherwise the words relating to the policy would be without meaning. Without them the assignment would be inoperative for any purpose. It would not render the policy void, but it would be of no value. If the property was burned the underwriters would be under no obligation to pay any one—not the assignee—for the property destroyed did not belong to him, so he incurred no damage, nor the assured, for he had parted with the contract of indemnity.

But if we take the prohibition as applying to the policy disconnected from the property, it will not work the result claimed by the appellant. An assignment is a transfer or setting over of property, or of some right or interest therein, from one person to another, and unless in some way qualified, it is properly the transfer of one's whole interest in an estate or chattel or other thing. In that sense the policy in question had not been "assigned." It with others was delivered to the creditor upon an agreement that the policies should stand as collateral security for certain claims held by it against the insured, and in case of loss to the property insured they should "be payable" to the bank, as its "claim against the insured should appear." The assured did not part with the title. The transfer was not unconditional. They retained not only the whole insured property, but an interest in the policy. In any proceeding for its enforcement they would have been a necessary party—*Simson vs. Satterlee*, 64 N. Y., 657; *Johnson vs. Hart*, 3 Johns. Cas., 322; *Conover vs. Ins. Co.*, 1 N. Y., 290; *Bard vs. Poole*, 12 id., 495; *Whitney vs. McKinney*, 7 Johns. Ch., 144; *Field vs. The Mayor*, 6 N. Y., 179—and, upon payment of the debt, entitled to what they in fact have had—a redelivery of the policy. The agreement under which they transferred it did not profess to vary in any respect the contract of insurance. It was at most a mere appointment of the bank to receive and a direction to the insurers to pay to it the loss when, if at all, it should accrue. In other words, it was an appropriation beforehand, to the payment of specific debts, of a portion of the money which might accrue by reason of the cause insured against, and the plaintiffs had as much interest in the policy after its pledge to the bank as they had before. The money for which the insurers might become lia-

ble was to be applied to their use. The bank held it in trust as bailee and not as owner, and until, by an act of the assured, some person other than themselves should stand in that situation, the prohibition against assignment could not apply, and the policy remained valid to protect their interest: *Hitchcock vs. Northwestern Ins. Co.*, 26 N. Y., 68; *Jackson vs. Silvernail*, 15 Johns., 277; *Sherman vs. Niagara Ins. Co.*, 2 Sweeney, 470; *Lazarus vs. Commonwealth Ins. Co.*, 5 Pick., 80.

In *Conover's case*, supra, the charter of defendant provided that whenever the insured property "shall be alienated by sale or otherwise, the policy shall thereupon be void," and it was held that the words did not embrace a mortgage, since it creates but a lien or security, and does not transfer the title, and in *Sherman's case*, supra, the same rule was held to apply to a clause forbidding the transfer of the policy. To take away the cause of action in one case, and to render void the policy in the other, equally requires a transfer or alienation of the entire insurable interest.

It seems, indeed, to be well settled that as long as the insured retains such an interest that he may be a sufferer by the loss, the policy remains valid to that extent.

The cases relied upon by the appellant do not seem inconsistent with this conclusion. In the *Smith case*, 1 Hill, 497, there was not only an express and literal assignment of the policy, but of all "rights and claims which might arise thereon." *Savage vs. Ins. Co.*, 52 N. Y., 502, related to a change of title to the insured property. *Ferree vs. Oxford Ins. Co.*, 67 Penn. St., 373, differs from the case at bar in several particulars, but one is enough. There the court call attention to the condition which includes in words not only an assignment of the whole policy, "but of any interest in it," and also found in other parts of the policy an express intention to prohibit assignments made as collateral security. The one before us prohibits an assignment of the policy, that is—as we must construe it—an absolute assignment of the whole; the other forbids not only such an assignment, but an assignment of any interest. These various and differing limitations would be entirely useless if they were not intended by insurers to distinguish between acts of the insured in the disposition of the policy as a whole, and its transfer by way of pledge or mortgage for a special and temporary purpose. In many cases the distinction indicated by the papers referred to is material, and I see no ground upon which it can be disregarded in this instance. Similar words have been held by other courts insufficient to include

a transfer by way of pledge or security, and we find no reason to differ from them: *Ellis vs. Kreutzinger*, 27 Mo., 811; *Ins. Co. vs. Kelly*, 82 Md., 421. If there is difficulty in the question, it is because the language chosen and employed by the insurers leaves the matter in doubt, and to the benefit of that they are not entitled: *Herrman vs. Ins. Co.*, 81 N. Y., 184; *Allen vs. Ins. Co.*, 85 id., 473.

The judgment appealed from should be affirmed.

All concur, except Earl, J., dissenting.

Judgment affirmed.

SUPREME COURT OF NEBRASKA.

Error from Lancaster County.

WESTERN HORSE, ETC., INS. CO. }

vs. }

SHEIDLE.*

The policy is prima facie evidence of the ownership of insured, and such ownership need not be alleged in the petition where the policy is made a part thereof; if such ownership does not exist, it is a matter of defense.

Where it is alleged that the policy was issued in consideration of the covenants performed, and the policy avers payment of premium, this is sufficient allegation of consideration.

It is sufficient allegation of demand of payment to allege that "plaintiff would not pay said sum or any part thereof."

The note given for payment of premium was not paid until after the loss. The policy provided that in case of non-payment at maturity the company should have the right to cancel.

Held, That the company must exercise its option to cancel in order to terminate the policy for non-payment of the note.

Held, That where the policy had not been thus canceled, the fact that the note was only paid after the loss, and without notifying of the loss, would not affect the liability.

J. R. WEBSTER, W. E. STEWART, and CHARLES OGDEN, *for Plaintiff*.

A. K. WEBSTER, *for Defendant*.

REESE, J.

This cause was tried in the district court, upon the following stipulation or agreed statement of facts: (1.) "That on the fifth day of June, 1883, the defendant issued and delivered to plaintiff its policy

* Opinion filed, December 1, 1885.

of insurance No. 6858, the same being hereto attached, marked 'A' and made a part of this stipulation, insuring plaintiff against loss on one sorrel gelding in the sum of \$125, and on one bay horse, \$75. (2.) That plaintiff gave his note for the premium, said note being hereto attached, marked 'B' and made a part of this stipulation. (3.) That before the expiration of said policy of insurance, but after said premium note was due and unpaid, defendant placed said note in the hands of an attorney for collection; that said attorney gave plaintiff notice that said note was in his hands for collection, which notice is hereto attached, marked 'C' and made a part of this stipulation. (4.) That on the fifteenth day of March, 1884, the plaintiff paid said note and interest thereon, to said attorney, and said attorney remitted the same to the defendant within one week thereafter, less collection fees, and that plaintiff did not disclose to said attorney the fact that said sorrel horse had died on the day previous. (5.) That said sorrel gelding died on the fourteenth day of March, in the afternoon of said day, about three o'clock p. m., and without fault or neglect on the part of the plaintiff. (6.) That plaintiff gave the defendant notice of said loss as soon as he could find the agent of said company, and within six days after said loss. (7.) That more than forty-five days before the commencement of this action, plaintiff gave defendant proof of said loss on blanks furnished by defendant, as required in said policy. (8.) That said horse, said sorrel gelding, was of the value of \$150; that defendant refused to pay the sum of \$125, and has not paid the same, nor any part thereof. (9.) Plaintiff has performed all other conditions of said policy by him to be kept and performed, except as negatived by this stipulation. (10.) It is further stipulated that after defendant was served with summons, and before this cause was tried in justice court, defendant tendered the premium paid by plaintiff for insurance on said sorrel gelding, from the time said note was due to the expiration of said policy, to plaintiff, with interests and costs to that date thereon, and is now ready to pay the same, and brings the same into court and makes said tender good. The above are stipulated to be the facts of the cause so far as competent or material." (Signed, etc.)

It is not necessary to set out copies of exhibits attached to the stipulation further than to say the note referred to as exhibit B is a negotiable promissory note, with condition that in case of loss the note should become due and be deducted therefrom, and that in case of the non-payment of the note at maturity, "the company shall have the right to cancel the policy, but, at their option, may revive

it after full payment of principal, interest, and charges, have been made."

The court found in favor of defendant in error, whereupon a motion for a new trial was made upon the grounds that (1) "the pleadings of the cause will not support a judgment; (2) that upon the issues joined defendant is entitled to a judgment for costs, and that plaintiff's action be dismissed; (3) because judgment was rendered in favor of the plaintiff, whereas, upon the pleadings and facts, defendant was entitled to judgment upon the law and issues joined; (4) because the court admitted the stipulation of facts to be considered in evidence, to which defendant at the time objected, and excepted because the petition of plaintiff did not entitle him to adduce any evidence in the cause." This motion being overruled and judgment entered, plaintiff in error seeks a review. . .

There are two principal and decisive questions in this case, to wit: First, Whether or not the petition is sufficient to sustain the judgment; and, second, if so, whether the defendant in error could rightfully recover under the stipulated facts. The petition alleges, in substance, that defendant is an incorporated insurance company; that on the fifth of June, 1883, in consideration of the covenants performed by the plaintiff, it issued and delivered to him the insurance policy, a copy of which is attached to the petition; that the gelding horse insured in said policy for \$125 died on the fourteenth day of March, 1884, and that said death was not caused by the fault, neglect, or procurement of the plaintiff in the action, and that of all of which defendant, plaintiff in error, had due notice; that on the twenty-eighth of March, 1884, proof of loss was served on the company, and that the horse was worth \$150, and that plaintiff has kept all the conditions of the policy which he was required to keep and perform; that defendant company has not paid, and will not pay, the said sum of \$125, nor any part of it, to his damage in that sum. The answer admits the incorporation of the company and the issuance of the policy as alleged, and denies all other allegations. The objections to the petition will be noticed in the order presented by the brief of plaintiff in error, the first of which that there is no allegation that at the time of the issuance of the policy the defendant in error was the owner of the horse insured, or had any interest in him. The policy is attached to the petition, and its recitals are made a part of it. In this policy it is said that the company does insure William Sheidle against loss, by accident, etc., to the property described. This showed the interest of defendant in

error : *Insurance Co. vs. Slaughter*, 20 Ind., 526. The mere fact of the contract of insurance being effected should, we think, be enough *prima facie* to prove the ownership of the property. If the contract was procured by fraud, and such ownership did exist, or if the insurance was simply a wager policy, it was proper matter of defense; and if relied upon, should be pleaded as a defense. The same may be said of the second objection, that it is not alleged that defendant in error was the owner of the horse at the time of his death.

The third objection is that it is not alleged that any consideration was given for the issuance of the policy. We think it is substantially so alleged. It is alleged that the policy was issued in consideration of the covenants performed by the plaintiff, and the policy itself, which is embodied in the petition, shows upon its face and acknowledges the payment of the premium. The fourth and fifth objections are that there is no averment that payment has been demanded, or that any sum is or has been due plaintiff on the policy. As to the demand, it would seem clear that the proof of loss "on blanks furnished by defendant's agent," with the allegation that plaintiff in error "would not pay said sum of \$125, nor any part thereof," is a sufficient allegation of demand, if such allegation were necessary. While it is true that the petition was not drawn with that degree of care usually deemed necessary by a careful and skillful pleader, yet we think it fully appears from the petition that the amount claimed is due. The contract is set out at length; the allegation of compliance with its terms on the part of defendant in error, the failure of plaintiff in error to pay, and the damage resulting, is stated. The objection being made for the first time after judgment, the petition will be upheld if by any reasonable construction it is found sufficient. Other objections of a general nature are made to the petition, but upon an examination of all the allegations it is deemed sufficient.

The next question presented is as to the right of defendant in error to recover upon the facts as agreed to in the stipulation; the note given for the premium not having been paid until after the death of the insured property. By reference to the note, a copy of which is attached to the stipulation, it may be seen that the non-payment of the amount for which it was given does not terminate the policy; the provision being as follows: "If this note be not paid at maturity, the company shall have the right to cancel the policy, but at their option may revive it after full payment of principal, in-

terest, and charges has been made." By this provision it is apparent that the vitality of the policy did not necessarily depend upon the payment of the note. Plaintiff in error had the right, if it so elected, to terminate the contract of insurance, but in order to do so an affirmative act upon its part was necessary. So long as it insisted upon the payment of the note, and declined to cancel the policy, so long its obligations continued. Had suit been brought upon the note, its collection could not have been successfully resisted. The policy continued in force until canceled. The right to cancel was waived: *Schoneman vs. Insurance Co.*, 16 Neb., 404; s. c., 20 N. W. Rep., 284, and cases there cited; also, *Heaton vs. Insurance Co.*, 7 R. I., 502; *Goit vs. Insurance Co.*, 25 Barb., 189.

It is insisted that the payment of the note to the attorney in whose hands the note was placed for collection, without making known to him the fact of the death of the property, was an act of bad faith, and that the tender of the money back, after suit brought, should relieve the company from any liability. To this it may be answered, the note matured on the twenty-seventh day of July, 1883, and plaintiff might have terminated its liability had it seen proper to do so. The note was paid on the fifteenth day of March, 1884. Notice and proof of loss was given and made more than forty-five days before the commencement of this action. Yet plaintiff in error held the money until after the commencement of the action; thus treating the contract of insurance as binding until the service of summons. It may be, and is perhaps true, that the loss hastened the payment of the note. Yet the payment, not being essential to the life of the policy, its payment or non-payment could not change the rights of the parties.

The judgment of the district court is affirmed.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

*In Error to the Circuit Court of the United States for the District
of Minnesota.*

LONDON ASSURANCE CORPORATION, *Plaintiff*
in Error,

vs.

EUGENE J. A. DRENNEN, FREDERICK W. STARR,
AND EDWARD D. EVERETT, PARTNERS AS DREN-
NEN, STARR & EVERETT.*

A firm had agreed upon compliance with certain conditions that another party should be received into their business and a new company should be formed, but that no change should take place in the name or character of the firm "until said corporation shall be formed."

Held, That a mere compliance with the preliminary conditions by putting in money which was mingled with the capital stock and subject to all its contingencies, even though the party so complying shared in the profits, where the corporation had not been formed, and no actual transfer of title to the property insured had taken place, was not a change of title or possession within the policy.

HARLAN, J.

This case has been once before in this court. Drennen vs. London Assurance Co., 113 U. S., 51. It is an action upon two policies of fire insurance, executed March 10, 1883, and covering certain goods, wares, and merchandise belonging to the firm of Drennen, Starr & Everett. Each policy contains the following pro-

* Decision rendered, January 18, 1886.

visions: "If the property be sold or transferred, or any change takes place in title or possession (except by succession by reason of the death of the insured), whether by legal process or judicial decree, or voluntary transfer or conveyance, * * * then, and in every such case, this policy shall be void." "If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, * * it must be so represented to the corporation and so expressed in the written part of this policy, otherwise the policy shall be void. When property has been sold or delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate."

The insurer contends that after the execution of the policies, and before the loss of July 29, 1883, there was, by the voluntary act of the insured, a sale or transfer of the property, or such a change in title or possession as rendered the policies, by their terms, void. This defense rests entirely upon the claim that, prior to the loss, one Arndt was admitted as a partner in the firm of Drennen, Starr & Everett. The plaintiffs deny that he ever became a partner with them, or ever acquired any interest in the property insured. Upon the record as it was at the former hearing, that question depended mainly upon the construction of the written agreement of May 24, 1883, which is given in full in 113 U. S., 52, whereby the insured agreed to receive Arndt "into their business," upon certain terms and conditions, among which are the following: That the company should be incorporated; that Arndt should pay into the firm for its use, on or before June 14, 1883, the sum of \$5,000, and a like sum on or before January 1, 1885, the latter amount, until paid, to be evidenced by his promissory note, dated January 1, 1883, and each payment to bear interest at eight per cent from the date last named; that the business "to be carried on by the new company to be formed"—the name of which was to be thereafter determined—should be of the same nature as that then conducted by Drennen, Starr & Everett; and that "no change in the name or character" of that firm "shall be made until said corporation shall be formed." Arndt paid to the firm, on the 18th of June, 1883, the sum of \$5,000, and executed on the 3d of July of the same year the required note for a like amount, the money and note being entered to his individual credit on the books of Drennen, Starr & Everett. Upon this state of facts this court, reversing the judgment rendered for the

insurer, said: "The instruction by the court below proceeded upon the ground that the payment by Arndt in cash and notes of the amount which he agreed to pay, and their receipt and entry upon the books of the firm to his credit, gave him an interest as partner in the business; whereas such facts only established the performance of some, not of all, the conditions prescribed; for, by the agreement, the formation of the proposed corporation was expressly made a condition, with the others named, to Arndt's becoming interested in the business. In our judgment, looking at the whole agreement, the parties did not contemplate a partnership, and none was ever established between them. The agreement looked only to a corporation, the payment and other things specified being in preparation for its ultimate formation, which was an adequate, as it was the actual, consideration; consequently there was, prior to the loss, and under the most liberal interpretation of the policy, no change in the title or possession of the property, nor any transfer thereof, that avoided the policies."

At the last trial there was evidence to the effect that Arndt, after paying the \$5,000 in cash, and executing his note for the same amount, became entitled, by agreement with the insured, to participate in the profits of their business from January 1, 1883—he paying interest on these amounts from that date. And there was some slight proof that Drennen upon one occasion spoke of Arndt as a member of his firm.

On behalf of the insured it is contended that, even if Arndt had become a partner in their firm, the policy would cover their interest in the property. This results, it is claimed, from that clause in the policy providing for the termination of the insurance if the property be sold or delivered or otherwise disposed of, "so that all interest or liability on the part of the insured herein named has ceased." We deem it unnecessary to consider this question, because the case can be satisfactorily determined upon other grounds. In view of all the evidence, the court, when delivering its charge, might well have assumed that there was no purpose on the part of the insured, or of Arndt, that the latter should have such an interest in the property as would belong to a partner. The court, therefore, rightfully refused to instruct the jury that upon the undisputed evidence Arndt became a partner in the firm of Drennen, Starr & Everett. Such an instruction could not have been given without disregarding the interpretation which this court at the former hearing gave to the written agreement of May 24, 1883; for, it was then said that the

parties, by that agreement, appeared, *ex industria*, to have excluded the possibility of Arndt's acquiring an interest in or any control of the insured property in advance of the formation of an incorporated company. That interpretation was not affected by the fact that Arndt paid \$5,000 in cash and gave his note for a like amount; for, as heretofore said, those acts were simply in execution of the agreement and in preparation for the ultimate formation of the proposed corporation, and were not, as the court below properly decided, evidence of a partnership. The payment of the money and the execution of the note was plainly required by the agreement, and the purpose of both acts is to be ascertained from its provisions.

The main ground upon which the defendant, at the last trial, claimed exemption from liability on the policies, is indicated in two of its requests for instructions to the jury: 1. That "if it was not the understanding that Arndt became a lender of money, and if it was the understanding between the parties that the amount of his investment was to be risked in their businesses and become part of the capital stock, and he was to have a share of the net profits, he is not a mere lender, but a partner;" 2. That "when a person contributes a portion of the common capital stock, which is mingled with the contributions of other parties, and the whole is managed for the joint interests of those who contribute, the contributors, each having a share of the net profits of the business, they become thereby, partners as between themselves in the capital stock or property of the concern."

We are of opinion that the court did not err in declining to so instruct the jury. The question is not whether Arndt, by reason of his participation in the profits of the business of Drennen, Starr & Everett, could have been charged at the suit of creditors as a partner in that firm. The inquiry is, whether the insured, after the execution of the policies, and before the loss, sold or transferred the property covered by the policies, or whether there occurred, during that period, any change in title or possession. If there had been a sale or transfer of the entire property to one who had no interest in it nor any right to control it at the time the contract of insurance was made, there would undoubtedly have been such a change in the title as to render the policies void. And, for the purposes of the present case, it may be conceded that such would have been the result had Arndt become a partner in the firm of Drennen, Starr & Everett. But the sale or transfer to which the policies refer was one that would pass an interest in the property itself. Mere partici-

pation in profits would give no such interest contrary to the real intention of the parties. Persons cannot be made to assume the relation of partners, as between themselves, when their purpose is that no partnership shall exist. There is no reason why they may not enter into an agreement whereby one of them shall participate in the profits arising from the management of particular property without his becoming a partner with the others, or without his acquiring an interest in the property itself, so as to effect a change of title. As the charge to the jury was in accordance with these principles, and as the evidence conclusively showed that Arndt did not, prior to the loss, acquire an interest in, or any control of, the property insured, but was only entitled to participate in the profits arising from its management after a named date, there is no reason to disturb the judgment. It is, therefore, affirmed.

; COURT OF APPEALS OF NEW YORK.

BERTRAND CLOVER, Jr., *Respondent*,

vs.

GREENWICH INS. CO., of New York, *Appellant*.*

Where there was no legal evidence of the amount of damages except the appraisal, a charge to the jury that if the arbitrators exceeded their authority the plaintiff was entitled to whatever damages he had suffered, would be fatal except for the fact that it affirmatively appeared not to have influenced the verdict.

Where the policy provides that the loss shall be payable sixty days after notice and proofs are furnished, and also authorizes an extension of time until after certain proofs, certificates, etc. are furnished, the insurer is not entitled to an additional sixty days after furnishing the latter.

Evidence of an award to a co-tenant from another company for damages to his interest is not admissible where it does not affect the liability of the company defendant.

A provision allowing the company to elect to rebuild within sixty days after the completion of proofs, refers to the proofs unconditionally required by the policy and not to subsequent optional proceedings; also provided for in order to ascertain the amount of loss.

The fact that machinery damaged belonged to another party and the plaintiff could compel its removal by him from the building did not necessarily preclude the plaintiff from claiming for the expense of such removal as a preliminary necessity to repairing the damage where the policy indemnified for the expense of such repairs.

RUGER, C. J.

There were two items of evidence only upon which the verdict of the jury with respect to the amount of damages could have been based, viz : (1) The award of the appraisers assessing it at \$1,225, and (2) the proofs of loss, in which it was stated \$1,250. The court, in charging the jury, directed them to bring in a verdict for the

Decision rendered, January, 1886.

amount appraised by the arbitrators, with interest from September 5th, 1882, in case they should find that the arbitrators had not exceeded their authority in making the award. The jury found for that sum, and the inference is quite conclusive that their verdict was founded upon the award and not upon the proofs of loss.

It is evident, therefore, that the defendant was not injured by the charge of the trial judge to the effect that if the jury found that the arbitrators exceeded their authority in making the appraisal of damages, the plaintiff was entitled to whatever damage he had suffered by the loss in question. There being no legal evidence of the amount of such damages aside from the appraisal, an exception to the charge would have been fatal to the judgment but for the fact that it affirmatively appears that it did not influence the verdict: *Thorne vs. Turck*, 94 N. Y., 90.

The objection that the action was prematurely brought is not sustainable. The policy provides that the loss shall be payable sixty days after due notice thereof, and proofs of the same are received by the insurers. This clause evidently refers to the proofs of loss required by the policy to be made by the insured within thirty days after the fire and not to any performance of the plaintiff which might or might not be thereafter required of him under the policy by the insurers. The clause of the policy providing that the one-year limitation shall run against the assured, notwithstanding the pendency of proceedings to appraise damages, might otherwise enable the insurers by inaction and delay to retard, if not defeat, any recovery on the policy. The provision authorizing an extension of the time of payment of a loss until after certain proofs, declarations, and certificates are produced, seems to exclude the hypothesis that the defendants were also to have sixty additional days after such proofs had been made.

This provision contemplates a postponement of the right to bring an action only until such proofs are made, and rebuts the inference that any longer delay was intended.

The action was not commenced until September 9th, 1882, nearly four months after proofs of loss were served, and several days after the completion of the award of the appraisers, and was not, as we think, prematurely brought.

Neither did the court commit any error in excluding the defendant's offer to show that the plaintiff's co-tenant had received an award from other insurance companies for his individual interest in the property damaged, including the expense of removing the ma-

chinery preparatory to the work of repairing the real property injured. That fact did not affect the liability of the defendant upon its policy to the plaintiff, and he was entitled to recover whatever was necessary for him to pay in the restoration of the interest insured to its original condition. The sole question in this case in respect to the item objected to, is whether the plaintiff might be subjected to the expense of making the removal referred to. This question was not affected by a proceeding between strangers to this action in which the plaintiff took no part and had no interest, but was to be determined by the provisions of his policy.

As a defense to the action, defendant offered to prove that on the 9th of September, 1882, it served upon the plaintiff a written offer electing to rebuild or repair the property damaged by the fire in question. It then appeared in proof that on the 6th day of September, the defendant had refused to pay the award in question, and that nearly four months had elapsed since the service of the proofs of loss. The evidence was objected to and excluded by the court, to which ruling the defendant excepted. This evidence was claimed to be admissible under the clause in the policy providing that it should be optional with the company to repair or rebuild the property damaged within a reasonable time, giving notice of their intention so to do within sixty days after the completion of the proofs herein required. The proofs therein referred to are evidently the proofs of loss unconditionally required to be made by the assured according to the terms of the policy, and do not refer to the subsequent optional proceedings provided for by the policy for ascertaining the amount of a loss which may or may not be required to be taken in any given case. It would be an unreasonable construction of this contract to extend the exemption of the defendant from suit, and give them a right to defeat an action already brought to a period which they had the power to prolong indefinitely, even to the running of the limitation provided by the policies in favor of the insurers. The words "proofs" and "proofs of loss" are used indiscriminately in several places in the policy, and wherever used obviously refer to the particular statement of the loss required by the policy to be signed and sworn to by the assured within thirty days after the fire. Any other construction would involve the manifest absurdity of giving the assured a vested cause of action for his loss, and the defendant an indefinite right to defeat it by electing to repair or rebuild the property damaged. We think this option terminated when a right of action accrued to the assured upon the

policy by the expiration of the sixty days period of limitation and such other express limitations as are therein provided.

The only remaining exception of any importance is that taken to the refusal of the court to direct a verdict in the defendants favor upon the ground that the arbitrators exceeded their authority in making their award. The court charged the jury that the arbitrators had no authority to go outside of the subject-matter submitted to them, and if they did so their appraisal was not binding upon the parties. This direction was manifestly correct unless there was undisputed evidence of an unlawful exercise of authority by the appraisers. We do not find such evidence in the case. The proof was in some respects obscure and conflicting, but we do not find any conclusive evidence that the arbitrators included in their award any item of damage not properly chargeable under the policy to the defendant. The award was made for a gross sum, and nothing therein shows the items of which it was composed. This was attempted to be established by the testimony of the appraisers, and proof of admissions made by one of them. There was no item of damage questioned by the defendant which was indisputably included therein except that of the expense of removing machinery preparatory to making repairs. As we have already seen, such removal was a necessity in the work of restoring the premises to their original condition, and an allowance for its expense is clearly contemplated by the terms of the policy, providing that the cash value of the damaged property should not exceed the cost to the assured of replacing it. This provision seems to assume that the ascertainment of the cost of replacing is a legitimate method of determining the amount of the damage. The fact that such machinery wholly belonged to some other person did not necessarily exempt the plaintiff from the necessity and cost of making such removal. Even if the plaintiff had the right to require such persons to effect its removal, he was under no legal duty to await their action in doing so, or to enforce such right against them for the benefit of the defendant.

The existence of a contract between the plaintiff and other persons by which he could compel such persons to effect such removal did not diminish the liability of the defendant upon its policy. If the removal was a necessity of the repairs required to be made, and the policy indemnified the plaintiff for the expense of making such repairs, it would seem that the consideration of the amount of such expense was within the authority conferred upon the appraisers.

The point taken upon an attempted distinction between damages to flues and chimney is not justified by the evidence. The witnesses use the words indifferently and sometimes alternately, and the evidence fails to show affirmatively that the appraisers awarded for any loss in respect thereto which was not incurred.

The judgment should be affirmed.

All concur, except Andrews and Miller, JJ., absent.

SUPREME COURT OF PENNSYLVANIA.

UNIVERSAL FIRE INS. CO. }

vs.

BLOCK.*

Where the premium was paid by the insured to the broker who had applied through a regular agent for the policy, and the policy was sent by the agent countersigned by him as required to the broker, and by him delivered to the insured, the company cannot allege the non-receipt of premium, and set up a provision in the policy that it should not be valid until the premium had been received at its office. The doctrine of estoppel applies.

A company has no right to require a public officer such as a fire marshal, to certify to the correctness of proofs of loss, and such certificate is not essential to recovery.

JAMES C. SELLERS, Esq., for Plaintiff in Error.

GEORGE P. RICH, Esq., and MAYER SULZBERGER, Esq., for Defendant in Error.

GORDON, J.

The material assignments of error in this case, with the exception of the third and fourth, may be disposed of in two general classes : 1. That relating to the waiver of the condition of the policy which exempts the company from all liability until the actual payment of the premium, either at its office or to an agent authorized in writing to receive the same. 2. That which embraces the rulings of the court on the effect and character of the proofs of loss.

We will first dispose of the third and fourth assignments, in which complaint is made of the learned judge of the lower court, that he refused to say to the jury there was no evidence that the premium

* Decision rendered, October 4, 1885.

was paid prior to the alleged loss, so as to make the company liable therefor, and that they were instructed to inquire whether the defendant had not, by its course of dealing, justified the belief that Anderson was authorized to receive the premiums on its behalf, and if such were the case, the want of written evidence would not necessarily operate as a defense. We cannot agree that in either of these exceptions, the court below has been convicted of error. As to the first, the evidence is that Block paid the required premium to Heller, his broker, from whom he received the policy before that instrument came into his possession, and if we are to believe Anderson's written receipts, he received this money on and before the 14th of January ; then from Anderson it passed to Huntzinger in the shape of a check, but, as that came to hand after the fire, he refused to receive it. The next question involves not only the fourth assignment but also the second, and may, therefore, be discussed together with them. We have seen Block paid the required premium, and in due course received his policy. In looking at the face of that policy he would discover that it was issued in consideration of the premium which he had paid, and though he might have discovered the condition that it would not be effective until the amount of that premium was paid into the treasury of the company or to its agent, yet he might also observe this significant paragraph : " But this policy shall not be valid until countersigned by B. K. Huntzinger, Agent, at Harrisburg ;" seeing this he might well and logically conclude, (1) that Huntzinger was the duly accredited agent of the company ; and (2) the policy being countersigned by him, nothing more was required to insure its validity. The regular sequence of thought must necessarily be as follows : The premium has been paid ; the policy has come to hand in due course ; the consideration appears on its face as though paid to the company ; it has been regularly executed, and the stamp of complete verity has been given to it by the counter signature of the company's agent. In view of all this, after the company had thus compromised itself, it seems almost idle to discuss the powers of Huntzinger, or to inquire particularly concerning their limits ; nevertheless, we think the evidence warrants us in saying he did not act beyond the strict line of his authority.

Anderson sent the risk to Huntzinger to place in any company he thought fit ; he, on his own motion, placed it in defendant company, countersigned the policy and forwarded it to Anderson for the purpose of delivery. Anderson did deliver it, received the money

and sent it to Huntzinger. Who, then, in these particulars, was Anderson's principal if not Huntzinger? Moreover, the company well knew that this risk was in New York, where it had no office, and that Huntzinger was necessarily doing this and similar business through an agent in that city, and, for that matter, through this very broker. There is no doubt at all but there would have been no difficulty whatever about the regularity of this whole transaction, had the money reached Huntzinger before the loss ; but, if in such case, the regularity of Anderson's agency and Huntzinger's method of doing business would have been recognized, we cannot see how, or on what principle consistent with honesty and fair dealing, they can now be repudiated. Again we repeat, the company knew that Huntzinger was placing its policies in New York. Moreover, it knew that he could not go there personally and take contracts of insurance, for he had no power so to do because the company had no such power ; such contracts must be made, if at all, in the State of Pennsylvania. How, then, could it be supposed that the agent was to transact such business except through the regular channels of trade, that is, by the employment of banks or brokers? Under such circumstances as these, we cannot say that the court did wrong in referring the evidence to the jury, and we think it was altogether sufficient to warrant the finding of that body. We may agree that the result would have been different had Heller, who was the immediate agent of the plaintiff, neglected to pay over the premium to Anderson or Huntzinger, for then the case would have had some resemblance to that of the Pottsville Mutual Fire Insurance Co. vs. Minnequa Springs Improvement Co., 4 Out., 137, for in that case the plaintiff's own agent would have been chargeable with neglect, which could not have been attributed to the company. Here, however, there is no neglect on the part of any one. Everything was done in the regular and ordinary course of business, and the defense set up, must be regarded as utterly without merit.

Nor can we see how the doctrine of estoppel can fail to apply in a controversy such as this. As we have seen, the countersigning of the policy by Huntzinger, in accordance with the company's own direction expressed in writing on the face of that instrument, gave it the appearance of a valid paper, and thus Block was assured that every prerequisite had been complied with. By whose default, then, if any such man there was, did it pass through Anderson and Heller to the plaintiff? Intentionally, and in the regular course of business, the agent of the defendant issued that policy, and no attempt

was ever made, as in the case above cited, to countermand or revoke it. It was, then, the default of the company by which Block was misled, and we are at a loss to divine by what rule of law that default can be thrown over on the assured. It is a clear case of equitable estoppel, and the company must bear the consequences of its own neglect.

The other point has nothing at all in it. The proofs of loss were made out by a competent adjuster, and if they were not certified by the fire marshal of New York, it was because he had properly refused so to do. The company had no right to require a public officer to act in the adjustment of its risks, and the neglect of the assured to even ask a certificate from that officer would have been no default. Besides this, it was the duty of the company on the receipt of the proofs to return them, if they were objectionable, and point out the particular defects. This it refused to do, but replied generally, that they did not correspond with the printed instructions, and refused to receive them. This was not sufficient. Insurance companies cannot expect thus to escape from the payment of an honest claim through technicalities which do them no harm, and which they themselves can easily cure: *Beaty vs. Insurance Co.*, 16 P. F. S., 9; *Insurance Co. vs. Flynn & Hamm*, 2 Out., 627.

Judgment is affirmed.

SUPERIOR COURT OF KENTUCKY.

Appeal from Jefferson Court of Common Pleas.

SUSIE WHIPPLE

vs.

SUPREME LODGE KNIGHTS OF HONOR.*

A member of the order of Knights of Honor, who has been by his subordinate lodge suspended for immoral conduct, and for the non-payment of assessment, loses his good standing thereby; and if he dies while under such suspension, his beneficiary is not entitled to recover the benefit.

A grand dictator having, upon an appeal by a suspended member, affirmed the order of suspension during the life of such member, cannot, after the death of the member recall his affirmance, or take any action to restore the dead member to good standing.

The remedy of a suspended member, who feels aggrieved by an order of the grand dictator, affirming the order of suspension is by an appeal to the supreme lodge as provided by the laws of the order.

Suit brought to recover the sum of \$2,000, claimed as a benefit upon the death of George Whipple, formerly a member of the Knights of Honor.

RODMAN & BROWN, *for Plaintiff.*

BROWN & DAIRE and L. A. GRATZ, *for Defendant.*

RICHARDS, J.

Upon George Whipple becoming a member of Mechanics Lodge No. 1404, Knights of Honor, the supreme lodge issued to him a certificate, by which it promised to pay, after his death, to the beneficiaries therein named, the sum of two thousand dollars upon certain conditions, among which were that he should comply with the rules and regulations of the order, and be in good standing at the time of his death.

He having departed this life in December, 1882, the appellants, as beneficiaries under said certificate or policy of insurance, instituted this action to recover said sum. The right to recover was

* Opinion filed, October 28, 1885.

resisted upon the ground that at the time of Whipple's death, he stood suspended upon the charge of immoral conduct and for the non-payment of assessments.

The appellants admit the non-payment of the assessments, but claim the lodge had no right to collect them by reason of the proceedings under the charge of immoral conduct.

This charge, which rested upon Whipple's conduct while intoxicated in a public place, was tried by the lodge on October 30, 1882, and sustained; and by the decision he was suspended for the space of three months. On November 6th he appealed, as authorized by the rules and regulations of the order, to the grand dictator, whose office was at Danville, Kentucky.

On December 4, a written decision from the grand dictator, dated November 20, affirming the action of the lodge, was received and noted upon its minutes.

From this decision, Whipple was entitled to appeal to the supreme lodge at any time within thirty days; but he died before his right to prosecute the appeal had expired, without taking any steps to that end.

A rumor having reached the lodge to the effect that the grand dictator had, prior to November 20, sent a decision in writing to J. T. Funk, the reporter of the lodge, reversing the order of suspension, and that Funk had withheld it from the lodge, and by improper representations to the grand dictator had induced him to render the second decision affirming the suspension, charges were regularly formulated and preferred against Funk, based upon these statements.

The affidavit of the grand dictator, giving his version of what transpired on the appeal, was filed with the charges.

On March, 12, 1883, a trial was had and the case dismissed.

On March 19, the grand dictator came in person to the lodge, and upon his request, he was allowed to withdraw his decision against Whipple and file one reversing the action of the lodge.

It is now contended by the appellants that the grand dictator did in fact first send a decision in Whipple's favor to the lodge, which Funk suppressed, and afterwards induced him to render the decision affirming the action of the lodge. But their allegations to that effect in their pleadings were specifically denied by the defendant.

In support of its position, the defendant introduced Funk as a witness, who testified that he had received no decision except that re-

ported to the lodge. He admitted having received a communication from the grand dictator prior to that, but said he returned it, as it referred to the matters of some other lodge. The plaintiffs did not introduce the grand dictator upon the matter in issue. His affidavit, filed with the charges against Funk, cannot be considered upon this trial as evidence of the facts therein stated.

It was competent as part of the proceedings against Funk in the lodge; but that proceeding as an entirety resulted in Funk's acquittal of the charge of withholding the grand dictator's first decision.

But even if that affidavit was read here for all purposes, it could do no more than produce a contradiction in the testimony, and this being an action at law, the court's finding upon this question of fact could not be disturbed unless flagrantly against the evidence. It is true the court does not say in so many words that it finds the decision was rendered in Whipple's favor prior to his death; but the appellants will not be heard to say it is not embraced in the finding "that he was, at the time of his death, not a member of said lodge in good standing, but had been and was at that time suspended;" for they so treated it in the lower court, and did not request a more definite finding. It having been thus established beyond our power to alter it, that the grand dictator did not first decide Whipple's appeal in his favor, there remains nothing to justify the action of the lodge, taken three months after his death, by which the grand dictator was permitted to withdraw the decision affirming the order of suspension. It being assumed that the decision against Whipple, which was reported to the lodge, December 4, 1882, was fairly obtained, and the first rendered, there is nothing in the rules and regulations of the order, or in the law applicable thereto, that would authorize the grand dictator to withdraw it after it became the property of the lodge. If that decision did the member an injustice, his remedy was an appeal to the supreme lodge. Neither the subordinate lodge nor the grand dictator, nor the two acting together, can three months after a member has died suspended, impose a liability upon the supreme lodge by setting aside the order of suspension made prior to his death.

Let the judgment be affirmed.

Ward, J., and Bowden, J., concurred.

NOTE: This judgment is final, no appeal being allowed from the superior court, where the judgment of the lower court is affirmed without dissent.

SUPREME COURT OF PENNSYLVANIA.

Error to the Court of Common Pleas No. 2 of Philadelphia County.

SUPPLEE

vs.

KNIGHTS OF BIRMINGHAM OF PENNSYLVANIA.*

A society chartered for the purpose of benefiting and aiding the widows and orphans of deceased members, on the death of the member, paid the money to the woman who was living with him. Afterwards, his wife, who was separated from him for some years, claimed the money. *Held*, that as the company had never been notified of her claim, and had in good faith paid it to the person who they presumed was the wife of the deceased, she could not recover.

WILLIAM HENRY PEACE, Esq., for Plaintiff in Error.

B. F. FISHER, Esq., for Defendant in Error.

TRUNKY, J.

The second section of the charter of the defendant is as follows :
 "The purpose of this corporation shall be the maintenance of a society for the purpose of benefiting and aiding the widows and orphans of deceased members." This object is repeated in the first article of the constitution. Article 19 of the constitution provides that the fund "shall be paid to such person or persons as the deceased may have designated to receive the same, as appears on the books of the lodge of which he is a member," and in absence of such designation then to his widow; if no widow survives, then to his child or children.

* Decision rendered, April 20, 1885.—From *Legal Intelligencer*.

On February 1, 1882, John R. Supplee became a member of the corporation defendant, and was connected with Subordinate Lodge No. 8. At the time he executed a writing directing the payment allowed to him under the constitution and by-laws to be made to Fanny Supplee, his wife, and upon such payment the grand lodge to be released from any liability. This designation appeared on the books of the lodge.

The plaintiff testified that she and Supplee were married in 1858; that they separated in 1876; that for two years before his death he lived with Fanny Supplee; the witness understood he lived with said Fanny as his wife; and that a daughter of the plaintiff lived with Supplee and Fanny. There was nothing in the circumstances to indicate to the defendant that Supplee falsely represented said Fanny to be his wife in the designation entered on the book.

Supplee died, April 26, 1882, and notice of his death, with the requisite evidence, was given to the secretary of the subordinate lodge, and by him forwarded to the grand secretary, as provided by article 22 of the constitution. The verdict settles that the money was paid by the defendant to Fanny Supplee.

Neither written nor oral notice was given by the plaintiff to the proper officer of the defendant or of the subordinate lodge that she was the widow. If she told the fact to a member who was not an officer, that was not notice. She called at the house of Speel, secretary of the subordinate lodge, and told Speel's wife that she was the widow of Supplee, and Mrs. Speel so informed her husband. He did not inform the defendant that he had heard of the plaintiff's claim. Surely, her talk with Mrs. Speel and Dr. Marter was not notice to the defendant of her claim to the money as widow. The uncontradicted evidence shows that the defendant innocently paid the money to the person whom the deceased in his lifetime designated and represented to be his wife. Had the rejected offers of testimony been received the case would be no different; they were rightly refused.

Judgment affirmed.

Dissenting opinion by MERCUR, C. J.

I feel constrained to dissent from this judgment.

The sole object of the corporation, distinctly stated in its charter, is for the purpose of benefiting and aiding the widows and orphans of deceased members. This judgment withholds the aid from the unquestioned widow of the deceased, and gives it to one who was his

mistress. I deny the power of the corporation, by any device between it and the husband, to work this perversion of the fund. The allegation that the corporation did not have notice of the claim of the widow before it paid the money, is a flimsy excuse for its action. It had substantially all the notice the case would permit. It is a secret society. The widow could not appear before it when in session and present her claim. She caused notice to be given to the secretary of the subordinate lodge of which her husband had been a member, and the evidence of Marter shows that, at the next meeting of the subordinate lodge, he informed Henry Bell, now deceased, of the notice and claim of the widow. Bell was then the representative of this lodge in the grand lodge, and one of the directors of the latter. The court rejected evidence to prove that the sir chief of Lodge No. 8 knew the plaintiff was the lawful wife of the decedent before the money was paid.

It is difficult to see how notice any more substantial could be given than this widow gave. It seems to me that the charter is violated, and the evidence of notice and claim by the lawful widow, is disregarded by this judgment, for the benefit of one living with the decedent as his mistress.

SUPREME COURT OF ILLINOIS.

Appeal from the Appellate Court, 3d District.

NATIONAL BENEFIT ASSOCIATION

vs.

LOUISA JACKSON.

Orders on a railroad company were accepted in lieu of cash for the premium. One of the orders was paid, but the other, through a mistake of the railroad representative, was not honored.

Held, That a binding receipt acknowledging the premium evidenced that the orders were accepted as cash, and the failure to collect one of them did not defeat the policy, where the company neglected to notify the insured of its dishonor.

CRAIG, J.

This was an action brought in the name of Louisa Jackson, administratrix of the estate of Josiah Jackson, deceased, against the National Benefit Association, on a policy of insurance issued by the association, under which Jackson was insured against injuries from accidents. Before the trial of the cause the court allowed plaintiff to amend her declaration by striking out the word "administratrix." After the amendment, the defendant entered a motion to strike from the files the declaration, because of a variance between it and the summons. At the same time the plaintiff asked leave to amend the writ and all other papers in the case, in order that they might correspond. This motion the court allowed, and overruled defendant's motion. The amendments allowed by the court were fully authorized by Sec. 24 of the act in relation to practice. Rev. Laws 1874, page 778.

It is claimed that the admission fee \$8.00, and two assess-

ments of \$1.60 each, were not paid, and in consequence of non-payment the policy became void. The application which was signed by Jackson, contained the agreement that he should pay on becoming a member of the association, admission fee \$8.00, and two assessments of \$1.60 each, total \$11.20. The certificate or policy issued to Jackson contained, among other things, the following: "The National Benefit Association in consideration of representations, agreements, and warranties, and of the admission fee of \$8.00, and \$3.20, being for two advance assessments paid, the receipt whereof is hereby acknowledged, and the agreement to pay \$4.00 annual dues before 12 o'clock on the first day of January of each year, and the further sum of \$1.60 for each benefit assessment, in manner required by the board, does issue this certificate to Josiah Jackson. The sum to be paid is not to exceed \$1,000, and to be paid to Mrs. L. S. Jackson, or his legal representatives, within ninety days after satisfactory proofs that said member has sustained, during the continuance of membership, bodily injuries, effected through external, violent, and accidental means. The member agrees to pay the dues above specified, all payments to be made at the home office of said association. No delivery of this certificate shall be of any validity whatever, unless the holder of the same shall have previously paid the first payment, as specified in his application, or shall pay or secure the payment thereof at the time of such delivery. The holder agrees and accepts the same upon express condition that if either dues or assessments are not paid to the association within the time limited, then this certificate shall become null and void and of no effect."

The sum of \$11.20 required to be paid to make the policy valid between the parties, was not paid in money at the time the policy was issued and delivered. But Jackson, who was then an employe of the Indiana, Bloomington & Western Railroad Company, gave to the association, in payment of the amount, two orders on the paymaster of the railroad company, one for six dollars, and the other for five dollars and twenty cents. The first was payable out of his March time, and was duly paid when due. The second was dated March 21, 1882, and read as follows:—

"To J. F. Allen, Paymaster I., B. & W. Ry. Co.

Please pay the National Benefit Association * * * five dollars and twenty cents out of my wages for the month of April, 1882. JOSIAH JACKSON."

This order was presented to the paymaster, but was subsequently returned by him with the statement Jackson had "no time," which

was a mistake of the paymaster. Under these facts it is insisted that the association was not liable on the certificate of membership or policy which had been delivered to the insured.

We have given this matter a careful consideration, and we are not able to concur in the view of appellant's counsel. The association had the right, if it saw proper, to waive a cash payment, and accept in lieu of cash the orders on the railroad company, and if these orders were taken as cash, then, although the association failed to collect one of them, that fact cannot be held to defeat the policy. In the application which was prepared by the company and executed by Jackson will be found the following statement: "If the number of a binding receipt is inserted, it becomes conclusive evidence that the above amount has been paid." The above amount named is the \$11.20. The "binding receipt," which acknowledged the payment of \$11.20 was executed by the association, "No. 5,364," was inserted therein, and delivered to Jackson. This receipt never would have been given unless the association treated and accepted the orders as cash. Indeed, all the facts bearing upon the question point to the fact that the orders were accepted as cash, and the association having accepted them as cash, it must be bound by that act. At all events, the association having accepted the orders as cash, when one of the orders was returned to it by the railroad company not paid, good faith required that Jackson should be notified of the non-payment of the order, and the association could not, on any principle of fair dealing, claim a forfeiture of the policy for non-payment without giving Jackson notice, which was never done. There is no similarity between this case and a case where a promissory note has been given for a premium due at a future day, and the policy provides that it may be forfeited for the non-payment of the note when due; and the authorities cited which sustain a forfeiture in such a case have no application to the facts of this case.

It is also insisted that Jackson's death was occasioned by voluntary exposure to unnecessary danger, and hence the company is not liable. From the evidence it is plain that Jackson was killed while in the discharge of his regular duty as yard switchman or yard brakeman, while handling broken cars, and his death arose, not from voluntary exposure, but from an accident for which the contracting parties intended the association should be liable.

Judgment affirmed.

ST. LOUIS COURT OF APPEALS.

MAGGIE AGNEW, *Respondent*.

vs.

GRAND LODGE A. O. U. W., OF MISSOURI, *Appellant*.*)

Where the constitution of a benefit society provides that the assessments for death benefit are to be made by the subordinate lodges, an assessment alleged to have been made by such a lodge upon its members at a time when it conclusively appears the lodge held no meetings, is not a valid assessment, and a suspension for failure to pay such supposed assessment is not a valid suspension.

LEWIS, J.

The plaintiff is the widow of Samuel H. Agnew, deceased, who was a member of Lee Lodge, No. 61, located at Edina, Missouri, of the defendant order, a benevolent corporation. She obtained judgment in this case for \$2,000, with interest, for the death benefit appurtenant to membership, under the constitution of the order. The defense was set up, that the obligation to pay the benefit was expressly conditioned upon the proviso, that "said member shall have complied in all particulars with the laws, regulations, and requirements of the order ;" and that the deceased member in this case failed so to comply with said laws, regulations, and requirements, in this : that on January 1st, 1883, an assessment of one dollar, for the beneficiary fund, was made upon each member of the order, payable on or before the 28th day of said month, in accordance with the con-

*Decision rendered, March 7, 1885, and the amount being within the statutory sum, no appeal is allowed.

stitution and by-laws, of which due notice was given to Agnew, but he failed and refused to pay the same, and was thereupon, on January 29th, 1883, duly suspended from all the privileges of membership, including the right of participation in the death benefits. This defense, if sustained by the proofs, should be sufficient to defeat plaintiff's claim. Agnew died on March 16th, 1883.

The constitution of the order, after providing for notices of deaths, as they may occur, to be given to the grand recorder, and by him transmitted to all the subordinate lodges within his jurisdiction, proceeds thus :—

“Assessments. Each subordinate lodge shall then make an assessment of one dollar upon each member holding a certificate, or having received the M. W. degree, provided such member has received his certificate of M. W. degree prior to the date of the death on which the assessment is made. Written or printed notices of assessments shall be made and sent by the financier, not later than the 8th day of the month in which the notice was issued by the grand recorder.”

No competent testimony was offered to show that an assessment was ever made, as alleged, in conformity with this constitutional regulation. On the contrary, it was affirmatively shown from the records of the subordinate lodge, of which the deceased was a member, that no meeting of that lodge was held from July 7th, 1882, up to March 13th, 1883, so that there was no possibility of a lawful assessment in the month of January. No assessment for any other month was averred in the answer. There was an attempt to show from memoranda in the books of the grand recorder that Agnew had failed to pay an assessment, and was therefore suspended. But this was wholly incompetent for any such purpose. The constitution confers no power on the grand recorder to assess a member, or to suspend him. His functions in that connection end with his notice sent to each subordinate lodge, wherein the assessments must be officially made against its own members. It does not appear that he is the proper officer to make an authentic record of the proceedings of the subordinate lodge. There appeared also a notice issued by the grand recorder to the subordinate lodges, dated January 1, 1883, to the effect that the members must pay “this assessment” on or before the 28th of the said month, to the financiers of their respective lodges. But on the same paper appears a receipt signed by the financier of Lee Lodge, No. 61, without date, showing that Samuel H. Agnew has paid the assessment. Aside from this,

however, the notice, for reasons already stated, would furnish no proper evidence that an assessment had been made in conformity with the constitution.

The total failure of proof on a point so essential to the affirmative defense relied on renders it unnecessary to examine other questions discussed by counsel. Upon the issue as submitted, no judgment was possible, otherwise than for the plaintiff. All the judges concurring, the judgment is affirmed.

UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT OF NEW YORK.

ÆTNA NATIONAL BANK ET AL. }
vs. }
MANHATTAN LIFE INS. CO. ET AL.* }

A bill in equity may be maintained by creditors of a deceased debtor to set aside a fraudulent assignment of a life insurance policy originally payable to the debtor, his executors, administrators, and assigns, but fraudulently assigned by him to his wife while he was insolvent, and without valuable consideration, notwithstanding such creditors have not obtained judgments at law against the debtor in his lifetime, or against his representatives after his decease; it appearing that the complainants had, prior to the death of the debtor, obtained a decree in equity against him and his wife in the circuit court of the United States for the northern district of Florida, in which the amount of the complainants' debts was adjusted, and in which the said debtor was adjudged to be absolutely insolvent.

It appearing that the fund would be liable to be placed out of the jurisdiction of the court, and beyond the reach of creditors in case they should be ultimately found to be entitled, if the injunction should be refused, *held*, That an injunction pendente lite should be granted to restrain the insurance company from paying over the money under the policies until the rights of the parties should be determined.

In Equity.

WILLIAM B. HORNBLOWER, *for Plaintiffs.*
JOHN W. WOOD, *for Defendants.*

WHEELER, J.

According to the bill in this case the policies in question on the life of the husband were originally made payable to the executors, administrators, or assigns of the husband, and the premiums were

* Decision rendered, August 3, 1885.—From *Federal Reporter*.

paid out of his property, which, in equity, belonged to his creditors. And the assignment to the wife shortly before the death of the husband was for a merely nominal consideration, pecuniarily, and was made for the purpose of placing the avails of the policy beyond the reach of his creditors. It is inferable, from the statements of the bill, that the assignment was made in Florida, and not in New York. Its effect may be governed by the laws there rather than by the laws of New York, where the insurance company is located. And by the laws of either, the assignment may be so far inoperative, as against his creditors who bring this bill, as to entitle them to the amount due on the policy in preference to the wife as assignee. The fund would be quite liable to be placed out of the jurisdiction of this court, and beyond the reach of the creditors, in case they should be ultimately found to be entitled, if an injunction should be refused and the stay already granted vacated. It seems proper, therefore, that the fund be held where it is until the rights of the parties to it are determined.

It is objected that the creditors have not a sufficient judgment at law upon their claims to entitle them to maintain this proceeding. They have, however, a decree of the circuit court of the United States for the district of Florida, to which these creditors and the claimant were parties, as well as the debtor, in which, upon similar issues, the amount of their debts, respectively, was adjusted for the same purposes. And, further, the debtor has died, leaving the sum due on these policies as a part of his estate, if it belongs to his estate, within this jurisdiction, with no other creditors, so far as yet appears here. These grounds may be found sufficient to uphold the proceedings.

Motion for injunction granted.

SUPREME COURT OF CALIFORNIA.

CLAFFEY

vs.

HARTFORD FIRE INS. CO.*

Whether a barn was intended to be included within a bill of sale, in which the property sold was described as "the Wolfe houses," is a question of fact for the jury, and it is error for the court to instruct the jury that the bill of sale could not include the barn.

E. A. & G. E. LAWRENCE, *for the Appellant.*

GRAY & HAVEN, *for the Respondent.*

FOOTE, C.

Plaintiff, Claffey, instituted this action against the defendant, on a fire insurance policy, alleging that it covered a loss he had sustained by the burning of a certain barn. The defendant's main objection to payment of the demand was a breach of warranty on the part of plaintiff, in representing that the barn was his property, when he had no title thereto. The plaintiff, as tending to show ownership of the building in dispute, introduced in evidence the following copy of a bill of sale:—

For a valuable consideration, the Spring Valley Water Works grants and conveys unto John Claffey the Wolfe houses, but reserves the right to use the same until the first day of November, A. D. 1877.

Witness the corporate name and seal of said corporation hereunto subscribed and affixed by Charles Webb Howard, its president, in pursuance of a resolution heretofore passed by its board of directors, this ninth day of July, A. D. 1877.

THE SPRING VALLEY WATER WORKS.

By Charles Webb Howard, President.

* Opinion filed, December 4, 1885.

There was evidence introduced on the trial, which tended to prove that a house, barn, and two sheds had been built by a Mr. Wolfe, and they were generally designated "the Wolfe houses;" that they had become the property of the Spring Valley Water Works, and, under the bill of sale from that corporation, the plaintiff had become the owner thereof.

The word houses being used in the bill of sale, it is plain that more than one house was by it conveyed to the plaintiff, and such an ambiguity existed in that instrument as warranted an explanation by parol testimony to determine whether or not the term "the Wolfe houses" included the barn in question.

The court below informed the plaintiff, after all the testimony in the cause had been allowed to go to the jury, that a nonsuit ought to have been granted, because the bill of sale put in evidence did not include the barn, and that plaintiff had not shown any title in himself to it, and that the jury should be so instructed, which was done, and a verdict returned for the defendant.

The issues of fact as made should have been submitted to the jury for decision, upon the evidence introduced, and as such course was not taken, the judgment and order denying a new trial should be reversed, and the cause remanded.

Belcher, C. C., and Searls, C., concurred.

By THE COURT. For the reasons given in the foregoing opinion, the judgment and order are reversed and the cause remanded for a new trial.

UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF NEW YORK.

ÆTNA NATIONAL BANK ET AL.

vs.

UNITED STATES LIFE INS. CO. ET AL*.

A bill in equity may be maintained by creditors of a deceased debtor to reach premiums paid to a life insurance company in fraud of creditors of the insured out of funds of the insured, and in furtherance of a combination and conspiracy between the insured and his wife to hinder, delay, and defraud the creditors of the deceased, notwithstanding the said policies were made payable to the wife of the deceased, and notwithstanding the provisions of the statutes of New York exempting such policies from the claims of creditors of the husband, where the premiums do not exceed \$500. But the creditors have no claim upon the insurance in such case beyond the amount of the premiums and interest thereon.

In Equity.

WILLIAM B. HORNBLOWER, *for Plaintiffs.*

JOHN W. WEED, *for Defendants.*

WHEELER, J.

The policies in this case upon the life of the husband were originally made for the benefit of, and payable to, the wife. According to the bill the premiums were paid from the property of the husband in fraud of the rights of his creditors, who bring this bill. If this is all true, the amount due on the policy does not represent the prop-

* Decision rendered, August 3, 1885.—From *Federal Reporter*.

erty of the husband, nor any part of his estate, beyond the amount of the premiums. The insurance was upon her interest in his life, not the creditors' interest in his life, and the amount due represents her interest, and, beyond the amount of the premiums, is hers. An amount equal to the amount of the premiums may represent so much of his estate, and in equity belong to his creditors. They may ultimately, by these proceedings, reach that amount, but there appears to be no fair ground on which they can reach more.

Motion granted for an injunction to restrain payment of so much of policies as equals in amount the premiums paid thereon, with interest, and stay of proceedings vacated as to residue.

THE INSURANCE LAW JOURNAL.

VOL. XV.

APRIL, 1886.

No. 4

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF WISCONSIN.

WESTERN ASSURANCE CO.

vs.

TOWLE, IMPLEADED, ETC.*

The action was to recover the amount of a loss claim alleged to have been paid through fraudulent proofs and false swearing as to the extent of the loss.

Held: That when the amended complaint apparently sets out the same cause of action as the original, it will not be set aside as if the cause were different.

In the case of money obtained under false representations, recovery may be had on an implied contract to return the excess instead of on an action in tort.

In such an implied contract the admission of a partner is evidence against the firm.

When the suit is on such an implied contract recovery must be limited to the

* Opinion filed, December 23, 1886.

excess paid above the actual loss, unless it appear that the fire was chargeable to the wrongful act of the insured.

F. W. HOUGHTON, *for Respondent.*

S. U PINNEY and REED & SIMS, *for Appellant.*

TAYLOR, J.

This action was brought by the insurance company to recover from the appellant and Swan about \$1,000, which the company had paid to them upon a policy of fire insurance issued by said company to Towle & Swan as partners, upon an alleged loss by fire of property covered by said policy. The complaint charges that the payment of the \$1,000 was procured by the defendants from the company by making false and fraudulent proofs of loss and by false swearing on the part of the defendants, Towle & Swan, as to the extent of their losses; and that, relying upon such false statements and proofs of loss, and not knowing of their falsity at the time, they paid the \$1,000 to the defendants; that afterwards, upon ascertaining the falsity of their statements and proofs of loss, and that they did not in fact sustain the losses claimed by them, and that there was in fact but a very small portion of said \$1,000 due to them for losses under said policy, they demanded of said defendants the \$1,000 so paid to them by reason of said false and untrue proofs of loss and fraudulent representations; that the defendants have neglected and refused to pay the same; and demands judgment for the said sum of \$1,000 with interest from the 27th day of September, 1881, that being the date of the payment thereof to them by the company. The first complaint filed in the action was demurred to as not stating a cause of action; and thereupon the plaintiff filed an amended complaint, to which the defendant Towle answered, and Swan suffered a default. For the details of these complaints a reference must be had to the printed case.

After the summons was served, and before any complaint in the action was made or served upon the defendants, or either of them, he plaintiff procured to be made a sufficient affidavit for a writ of attachment against the property of the defendants, and upon such writ the property of defendant Towle was attached. Towle thereupon, and before the service of any complaint in the action, gave an undertaking, as authorized by section 2,742, Rev. St., conditional as therein required, and the property attached was released from said attachment. When the action was called for trial, and a jury impaneled to try the cause, the defendant Towle moved to dismiss the

amended complaint, and strike it from the files, for the reason that the action was begun as upon a contract and the amended complaint sounds in tort. This motion was overruled, and defendant excepted. The defendant then objected to the reception of any evidence under the amended complaint, on the ground that it did not state facts sufficient to constitute a cause of action. This objection was also overruled, and defendant excepted. After trial, the plaintiff had a verdict in its favor for \$1,204.36, upon which judgment was rendered against both defendants. Towle alone appeals from the judgment. The verdict was the amount paid by the company to the defendants on the 27th of September, 1881, with interest from that date to the date of the verdict, and no more.

The appellant makes the following assignments of error, upon the argument in this court: "(1) This the court erred in refusing to dismiss and set aside the amended complaint. (2) In admitting the evidence of Nelson as to Swan's admissions, made to him after the fire. (3) In instructing the jury in regard to such admissions. (4) In submitting to the jury, upon all the evidence admitted (including the proof of Swan's admissions), whether the fire by which the stock of staves was burned was set by the defendants, or either of them. (5) In instructing the jury 'that the plaintiff has offered some testimony tending to prove that the fire was caused by the act or procurement of the defendants, or one of them,' referring plainly to the proof of Swan's admission to Nelson. (6) In refusing to grant a new trial. (7) Other rulings and decisions set forth in the printed case."

Under the first assignment of error it is urged by the learned counsel for the appellant that the amended complaint should have been dismissed and set aside for two reasons: First. Because the original complaint in the action, though held insufficient in not stating facts sufficient to constitute a cause of action, was clearly intended to state a cause of action upon an implied assumpsit or contract to return the money fraudulently obtained by the defendants from the plaintiff, and it is alleged that the amended complaint clearly states a cause of action in tort to recover damages for the injury sustained by the plaintiff, by reason of the false and fraudulent representations made by the defendants, and which caused the plaintiff to pay them the sum of \$1,000. This objection is based upon the rule laid down by this court in the cases of *Supervisors vs. Decker*, 34 Wis., 378; *Lane vs. Cameron*, 38 Wis., 603, and many others which might be cited. We do not think this objection is

well taken. The nature of the transaction set out in the original complaint is precisely the same as that set out in the amended one; and if the amended complaint sets out a cause of action which must be treated as an action in tort, then it is clear to our minds that there was an intention to set out the same cause of action in the original complaint, and there was no ground, therefore, for setting aside the amended complaint under the rule stated in the cases cited.

Second. It is urged that because the plaintiff sued out an attachment in the case, and made an affidavit under the statute stating that the defendants were indebted to the company in the sum of \$1,000 upon an implied contract, etc., we ought to construe the complaint first filed as a complaint setting up facts showing an indebtedness upon an implied contract. This consideration should have great weight in determining the real character of the complaint filed, when, upon the facts stated, there is any real doubt as to its character. Judged in the light of that fact, we think the counsel is right in holding that the plaintiff, in the original complaint, intended to allege facts which would show an implied contract on the part of the defendants to pay the company the money they had obtained from it by their false and fraudulent practices; and, testing the amended complaint in like manner, we think that should also be held to be a complaint to recover of the defendants for money had and received by them, which, in law and in equity and good conscience, they had no right to retain, and therefore there was an implied promise to repay it to the plaintiff upon demand. The allegations of fraud, false swearing, and deceit practiced by the defendants, alleged in both complaints, are alleged, not as the cause of action, but for the purpose of showing that the defendants have in their possession a certain sum of money which in law they ought to pay to the plaintiff on demand. After setting up these facts, a demand is alleged, a refusal to pay, and a demand for judgment for the amount of the money, so unjustly withheld from them, and not to recover damages on account of the tortious acts of the defendants.

We think the claim of the learned counsel for the appellant, that the amended complaint must be treated as an action to recover damages for the tortious acts of the defendants, and not an action upon an implied contract on the part of the defendants to pay the money received by them from the plaintiff wrongfully, was decided against them by this court in the case of *Town of Fifield vs. Sweeney*

62 Wis., 204; s. c. 22 N. W. Rep., 416. In that case, as one cause of action, the complaint alleged that the defendant furnished teams to work for the town at three dollars per day; that the teams worked in fact two hundred and thirty-two days, and "that the defendant falsely and fraudulently represented, by false statements of account and bill rendered, that his teams had worked in the aggregate two hundred and sixty-five days; that he knew such statements to be false, and that he made them for the purpose of deceiving the town officers; that said officers believed such false representations, and by reason thereof paid the defendant for thirty-three days in excess of the time actually worked by his teams; that town orders were issued for said term work, and paid by the town treasurer before the error was discovered; and that the plaintiff has sustained damages herein in the sum of \$99, and interest." There was also in the complaint in that action an allegation of a demand for the amount of the money fraudulently obtained from the town, and a refusal to pay, before the action was commenced, as in the case at bar. This case is, in all its general features, the same as the one at bar; and it was held that "the whole complaint goes upon an implied assumpsit to repay the money so had and received, and interest thereon, and no other damage by reason of the fraud or mistake is claimed. The complaint as for money had and received, is even better by reason of the statement of the facts by which the assumpsit is implied, and these facts do not change the action into tort."

This court has repeatedly held that the plaintiff may waive the tort, and recover upon an implied contract, when money or property has been obtained by the defendant from the plaintiff by the tortious acts of the defendant: *Norden vs. Jones*, 33 Wis., 600; *Keyes vs. Railway Co.*, 25 Wis., 691; *Elliott vs. Jackson*, 3 Wis., 649-655; *Grannis vs. Hooker*, 29 Wis., 65; *Smith vs. Schulenberg*, 34 Wis., 41-50; *Wells vs. Express Co.*, 49 Wis., 224; s. c., 5 N. W. Rep. 333; *Graham vs. Railway Co.*, 53 Wis., 473-481; s. c., 10 N. W. Rep., 609. What was said in the last case cited is not, we think, in conflict with the decision in the case of *Town of Fifield vs. Sweeney*, *supra*. Each complaint must be judged of upon the exact facts stated in it in order to determine whether it be an action in tort or on contract. And in determining that question, the evident intention of the party in stating his facts must have effect in determining the question when the facts alleged might sustain a cause of action either in tort or on contract. As was said in the *Graham* case: "The original complaint was in tort; and as the second

amended complaint stated facts sufficient in themselves to constitute an action for tort, the court would presume that the pleader intended to go upon the tort as his ground of action, and not upon the implied assumpsit. To hold that the amended complaint was intended to be an action of tort would be consistent with the original cause of action stated, and would be a permissible amendment. To hold otherwise would be inconsistent with the original, and not permissible." So, in the case at bar, the plaintiff having caused an attachment to issue in the action, we must presume that he intended that his complaint should state a cause of action on contract, in order to sustain his proceeding by attachment; and the facts alleged being sufficient to allow him to recover on the implied assumpsit, the complaint should be construed as an action upon contract, and not to recover damages for the tort.

Construing the amended complaint as one to recover upon an implied contract to repay the money wrongfully received from the plaintiff, the second objection now made, but which was not made on the trial,—viz., that the complaint should have been dismissed for the reason that it does not state a cause of action which would authorize the issuing of an attachment,—would not seem to be well taken, had it been taken at the circuit. If it were admitted that the complaint was a complaint to recover damages for a tort, whether a motion to set it aside, because an attachment had been issued in the case, should be granted, or whether the only remedy of the defendant in such a case would be to set aside the attachment, is not a question to be determined in this action, as we hold that the complaint is not in tort, and because no motion to set it aside on that ground was made in the court below.

The determination of the second, third, fourth, and fifth assignments of error depends upon the admissibility of the admissions of Swan, one of the co-partners and one of the defendants in the action, in regard to the cause of the fire, as evidence for the plaintiff in an action to recover back the moneys paid to the partnership upon the insurance policy. The record shows that the admissions were made shortly after the fire, and before the dissolution of the partnership. The witness Nelson says: "I had some talk with Swan about setting the stock on fire, some time after the fire." "What did he say?" This was objected to by the defendant, the objection was overruled, and exception taken. The witness answered: "It was some time after the fire; I could not say how long,—may be a month. We were at the mill or house. He told me he put that

to fire himself, or set that afire. I cannot say how he worded it." The admission given in evidence was made while the appellant and Swan were still partners, and it related to a matter in which the partnership was interested, and it tended to establish the plaintiff's cause of action against them. The plaintiff was seeking by his action to recover from the defendants a sum of money received by them as partners from the plaintiff, and the question at issue between the plaintiff and the partners was whether in law they ought to have received said sum of money when it was paid to them by the plaintiff. We are clearly of the opinion that any statement made by either of the partners while they were still partners, tending to prove that they ought not to have demanded or received the money from the plaintiff, is admissible as evidence for the plaintiff, as against both of the defendant partners. The general rule is that the admissions of one partner are admissible against both, in an action by both or against both. The following cases would seem to be conclusive upon this point: 1 Phil. Ev., 498, notes 137, 139; *Bound vs. Lathrop*, 4 Conn., 338; *Walden vs. Sherburne*, 15 Johns., 409; *Corps vs. Robinson*, 2 Wash. C. C., 390; *Adams vs. Brownson*, 1 Tyler, 452; *Williams vs. Hodgson*, 2 Harr. & J., 474-477; *Chapin vs. Coleman*, 11 Pick., 331; *Wood vs. Braddick*, 1 Taunt., 104; *Thwaites vs. Richardson*, Peake, 23; *Henderson vs. Wild*, 2 Camp., 562; *Boyce vs. Watson*, 3 J. J. Marsh., 498-500; *Taylor, Ev.*, 626, § 743; *Crosse vs. Bedingfield*, 12 Sim., 35; *Whitcomb vs. Whiting*, 2 Doug., 652; *Rapp vs. Latham*, 2 Barn. & Ald., 795; *Nicholls vs. Downing*, 1 Starkie, 81; *Rawstorne vs. Gandell*, 15 Mees. & W., 304; *Phillips vs. Claggett*, 11 Mees. & W., 84.

The fact that Swan had suffered a default in the action, and was apparently hostile to his co-partner Towle, at the time of the trial, can make no difference as to competency of his admissions as evidence, although it would affect the weight of such admissions as evidence, especially if the admissions were made after commencement of the hostile feelings of Swan towards his co-partner. The evidence being admissible, there was no error in submitting such evidence to the jury as a part of the plaintiff's case.

As there was a general verdict only in the case, we cannot determine whether the jury found in favor of the plaintiff for the whole amount paid by the plaintiff upon the policy, on the ground that the fire which caused the loss was set, or caused to be set, by the defendants themselves, or by one of them, or upon the ground of fraudulent and false proofs of loss in overvaluing the property de-

stroyed by the fire. Had there been no proof which would have justified the jury in finding that the defendants, or one of them, set fire to the insured property, and so caused the loss, the verdict should have been, not for the whole amount of money paid by the company for the supposed loss, but for so much only as the amount paid exceeded the actual loss sustained by the insured. The action for money had and received is in some sense an equitable action, and the insurance company having voluntarily paid the money on an alleged loss claimed by the defendants, they can only recover back so much as in equity and good conscience they ought not to have paid.

The provisions in the policy in regard to fraudulent over-estimates of the loss, or false swearing as to the extent of the loss, working a forfeiture of their right to recover anything upon the policy, does not affect the rights of the plaintiff in this action to recover back money paid on the policy, nor enlarge its rights beyond what they would have been had no such provision been found in the policy. False swearing and false valuation in proofs of loss might have been a good defense to a recovery upon the policy had the plaintiff refused to pay the loss; but it cannot be made the basis of a right to recover back money already paid upon the policy. The plaintiff's right to recover depends upon proof establishing the fact that the company has paid more money than covered the loss sustained by the defendants, and that such payment was procured by the false and fraudulent acts of the defendants. This action for money had and received to the plaintiff's use is in no way founded upon the contract of insurance, but upon the fact that false and fraudulent representations were made by the defendants in order to induce the plaintiff to pay the same. This was so expressly held in *Northwestern Life Ins. Co. vs. Elliott*, 10 Ins. Law J., 333; s. c., 5 Fed. Rep., 225. In that case the policy upon which the money had been paid was void and illegal under the laws of Oregon. Still the company had paid the loss on the false claim of the death of the party whose life was insured. It was afterwards ascertained that the person whose life was insured was not dead, and the company thereupon brought an action to recover the money paid. It was insisted on the trial that the claim for the money was founded on the void and illegal contract of insurance, and for that reason no recovery could be had. Judge Dedy, in deciding the case, says (5 Fed. Rep., 229, 230): "True, the plaintiff might, at common law, upon the facts, have maintained assumpsit for money had and received by the defendant to the plaintiff's use; and the law, in the interest of justice, and by way of promoting the

remedy, which was in form *ex contractu*, would have implied a promise on the part of the defendant to pay. But this would not have been a contract arising out of the void and illegal one, nor in any respect in affirmance of its validity, but only an implication or fiction of law that upon the facts—the plaintiff being entitled *ex equo et bono* to recover the money which the defendant had wrongfully obtained from it—he promised to repay the same.” *Catts vs. Phalen*, 2 How., 376, holds the same doctrine.

The plaintiff in the case at bar, in order to avail itself of the right to sue out an attachment in this action, elected to waive the action for the wrong committed by the defendants, and bring their action for money had and received to its use, upon the implied assumpsit to repay the same. In this action it recovers the money, if it recovers at all, on the ground that it has paid for a loss which did not in fact occur. If the loss did in fact occur, to the extent of the payment made, then in equity and good conscience the money ought not to be refunded, and no promise to refund the same could be presumed in favor of the plaintiff; and if there was a loss, though not as great as the money paid, and the excess of payment was made on account of the fraud of defendants, as to such excess, there would arise an implied promise on the part of the defendants to refund the excess. The fraud consists in falsely overestimating the claim, and demanding and receiving the excess beyond the actual loss, and not in receiving the money which was justly due for a real loss sustained. We think, therefore, that this action for money had and received, which has always been considered an action at law, which is maintainable upon equitable principles, can only avail the plaintiff for the purpose of recovering what it has paid in excess of the real loss, if any, which was sustained by the defendants, unless the jury should find that the fire which destroyed the property was caused, either directly or indirectly, by the wrongful acts of the defendants, or one of them. If the latter fact was made to appear, there would be no loss under the policy which the plaintiff ought to pay. If, on the other hand, there was in fact an honest loss under the policy, and the plaintiff has paid more than such honest loss by reason of the fraud of defendants, that fact does not entitle the plaintiff to recover back in this action the amount of money which is covered by the honest loss.

The only case we have found which would seem to question the soundness of the conclusions we have arrived at upon the question of the amount the plaintiff ought to recover in this action, if there

was an honest loss, is *Insurance Co. vs. Matthews*, 102 Mass., 221. This was, however, an action of tort to recover money obtained by false representations, upon an insurance of live-stock. There were two points in the case: First, that there were false representations made at the time of procuring the policy, which rendered it void; and similar false representations made in making proofs of loss, upon which the money was paid. The case was, however, disposed of in favor of the insured and against the company upon another point not involving the question as to the amount which the company ought to recover in case a recovery was had by it.

The complaint of the plaintiff admits that some of the property burned was covered by the policy, and the proofs show the same fact; so that there was something due the defendants from the plaintiff upon the policy, after the fire took place, unless they wrongfully caused the fire, and in determining the amount the plaintiff ought to recover, the amount of such actual loss should have been considered, if they were entitled to recover at all on the ground of fraudulent representations as to the amount of the actual loss sustained. The learned circuit judge instructed the jury that if they found from the evidence that the loss of defendants was small, and materially less than the amount of the policies of insurance, and that the defendants knew that fact when they made their proofs of loss, and intentionally and knowingly stated the amount of the loss to be materially greater than they knew it to be, for the purpose of unjustly procuring from the plaintiff more than the amount of the loss, and the plaintiff paid the loss, relying upon such proofs, and in ignorance of their falsity, then the jury should find a verdict for the plaintiff for the full sum paid by it, with interest from the date of payment. This instruction was excepted to by the defendant Towle. As stated above, this instruction was erroneous, and did not state the true rule for establishing the amount the plaintiff should recover in this action upon that branch of the case. As there was only a general verdict in the case, we cannot determine that the verdict was not based upon the fact that there was a fraudulent overvaluation of the amount of the losses of the defendants. This erroneous charge may have induced the jury to render a verdict for the whole sum paid by the plaintiff, notwithstanding they found in favor of the defendant Towle on the charge that the fire was wrongfully set by the defendants, or one of them. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

SUPREME COURT OF VERMONT.

GENERAL TERM, NOVEMBER, 1885.

BRUCE, ADM'R,

vs.

CONTINENTAL LIFE INS. CO.* }

Under Sec. 730 R. L., no question in regard to the exclusion or admission of evidence by special masters can be raised in the supreme court, unless exceptions to the report are duly filed in the court of chancery.

Plaintiff's intestate took an endowment policy in defendant company in which it was provided that if after the payment of two or more annual premiums default should be made of any subsequent premium the assured should be entitled to a paid-up policy for as many tenth parts of the original policy as annual premiums had been paid; the premiums were paid part in cash and part in notes, and it was provided in the policy that if the assured should not pay the interest in advance each year on the said notes, then the policy should cease and determine. The assured paid four annual premiums, and then claimed a paid-up policy for four-tenths of the original policy; the company resisted, claiming the assured must pay the interest on his premium notes each year until the maturity of the policy, in order to be entitled to such paid-up policy; *Held*, That the plaintiff was entitled to a paid-up policy for four-tenths of the original policy.

A life insurance policy was described in the margin as a "non-forfeiture endowment policy with profits," but the policy was silent as to the meaning of the term "with profits;" the agent represented to the assured that the profits to which he would be entitled would come by the way of dividends which would be payable after four annual premiums had been paid, and that if he took a paid-up policy the dividends would be applied when he took such policy; *Held*, That the question was not what the company ought to have earned, but what in fact it did earn, that the company was bound to so conduct its business as to preserve its solvency; that it was warranted in changing from the percentage to the contribution plan, if that would best subserve the interest of all classes, and that assured was entitled to dividends under that plan.

* Opinion filed, February 26th, 1886. — Reported by John H. Senter, Esq., of the Montpelier Bar. We are also indebted to Hon. B. S. Taft, Judge of the Supreme Court of Vermont, for the report of the master in chancery from which the appeal was taken, and for briefs in the case.

Statement of Facts.

The following extracts from the report of the master in chancery sufficiently state the facts in this case. The orator was appointed by the Probate Court for the District of Caledonia, administrator upon the estate of Merrill T. Bruce, his son, upon the 12th day of February, 1883, and that said Merrill T. Bruce died on the 20th day of January, 1883; that one Norman H. Farr, an agent or solicitor for the Continental Life Insurance Co., of Hartford, Conn., applied to said Merrill T. Bruce and solicited him to become insured in said company, and advised him to take a ten-year endowment policy upon the participating plan, and represented to said Bruce that said insurance company did business upon both the mutual and stock plans; that its policy-holders under the mutual plan were entitled to participate in the profits of the business, which profits would be distributed to them in the way of dividends, which dividends would be paid each year, after the first four years, and would be applied in payment or reduction of premiums, after the payment of the first four premiums, and that the company would carry such policy at its actual cost. The company also in its various circulars makes similar representations, and that the profits would be equitably distributed among the insured. Upon these representations the said Merrill T. Bruce decided to take out an endowment policy on the participating plan for the sum of one thousand dollars, on which was to be paid ten annual premiums, and which would mature and become a perfected claim at the end of twelve years from the date of its issue, the said agent Farr told said Bruce that under this plan he could pay, if he chose, 60 per cent of each annual premium in cash and could give his note for the remaining 40 per cent and that the experience of the company had been that the dividends would take up these notes and it was expected that this would continue to be the case, that these notes would draw interest at 6 per cent, and that both premium and interest were to be paid in advance; that the dividends after the fourth premium had been paid, would be applied upon the notes, and it was expected would be sufficient to pay the notes in full; that there would be as many dividends as there were premiums paid; that when the fourth payment was made and the fourth note given, a dividend would then be applied upon the first note, and when the fifth premium was paid a dividend would be applied toward the payment of the second note, and so on; at every subsequent payment there would be an application of a dividend towards the payment of the notes until they were all can-

celed ; that after the fourth note was given, no further notes would have to be given, and that the premiums thereafter paid would be the same as the cash premiums paid the fourth year ; the said Farr did not represent that the company authorized him to promise dividends to the amount of 40 per cent, nor did he himself promise that they would pay this. But he did say that it was expected they would do so, and did represent that they had paid dividends of 40 per cent on such policies as Bruce was taking, but that the amount paid would depend upon the success of the company, and further told Mr. M. T. Bruce that the company was a new one. In its circular of 1868, the company says that in the new companies the ratio of disbursements to receipts are about the same as in old companies. Said Farr also represented to the insured that it was expected that the dividends would cancel the notes, and also represented that whatever profits or dividends he got, he would get when the policy was settled, and that he would get all his dividends when the policy first became a claim, and that there would be as many dividends as he made payments, and if the insured should take a paid-up policy instead of allowing his policy to mature the dividends would be applied when he took his paid-up policy.

The said agent Farr further represented that the policy would be non-forfeitable, and by his representations the insured understood that after the payment of his first premium, his policy would have some value if he failed to make further payments. I do not find that Farr so represented the matter to him or was aware that he so understood it. The defendant company, by its circular issued in 1868, gives occasion for such conclusion by using the following language: "And above all do not regard the amount paid for an insurance on your life as money spent never to be recalled, but as an investment which is sure to be returned to you or your heirs." The same circular contains the following: "With limited payments adopted by this company, the non-forfeiture plan must commend itself to every thoughtful person, as it enables one to pay the whole premium during those years when he is best able to lay by something for the future and to cease his payments without loss whenever they become a burden." * * "Should future payments cease after not less than two have been made, the policy is not void, but remains binding by its terms without further payment of premiums for as many tenths, fifteenths, or twentieths of the sums insured as there have been annual payments paid. The non-forfeiture policies of the company are so written that the payment of two annual premiums

render them binding for the amount of the insurance paid for, without further attention on the part of the holder, thus obviating all possible danger of loss either through inattention or inability to meet subsequent payments."

The same circular also defines non-forfeiture policies as "those which upon the payment of a certain number of premiums entitles the holder in case of inability to pay future premiums, to a paid-up policy for a certain portion of the amount insured."

I find that all the representations made by the agent Farr he was authorized to make by instructions from the general agent Thomas Hale and by circulars issued by the defendant company. Relying upon these representations, Merrill T. Bruce made application for such ten-year endowment policy, which would, if kept on foot till its maturity, become a perfected claim against the company in twelve years after its issue. And in response to said application he received an undertaking and contract of said insurance company that if the insured should pay said company on or before the 30th day of December of each year during the continuance of said policy the sum of \$104.86, the said insurance company would, within ninety days after due notice and satisfactory evidence of the death of said Merrill T. Bruce, or if the said Merrill T. Bruce should survive until the 30th day of December, A. D. 1882, they would pay the said Merrill T. Bruce the sum of one thousand dollars, less any indebtedness which might have accrued from the insured to said company on account of said policy, if any such indebtedness then existed, upon certain conditions stated in said policy.

Upon the receipt of this policy the orator paid the company the amount of the first premium by giving his note for the sum of \$41.94 and by paying them the sum of \$2.52 as interest in advance for one year upon said note and the sum of \$62.92 in cash. On the 30th day of December, 1871, the orator gave the defendant a note for a like amount and money in the same sum for the cash part of the premium and the further sum of \$5.04 as interest in advance upon said two notes. On the 30th day of December, 1872, the orator paid his premium and interest, \$7.56, in a similar manner. And also on the 30th day of December, 1873, he paid his fourth premium and interest, \$10.08, in a similar manner and all said premiums and interest were to the satisfaction of said company. Each of these four notes was made payable by its terms in twelve months after date.

One of the stipulations of the policy issued by said company to

said Bruce was as follows, to wit: "That if after the receipt by this company of two or more annual premiums on this policy a default shall be made in the payment of any subsequent premium when due, then notwithstanding such default, this company will convert this policy into a paid up policy for as many tenth parts of the sum originally insured as there shall have been complete annual premiums paid when such default shall be made, provided that this policy shall be transmitted to and received by this company, and application made for such conversion within one year after such default." The said policy had also indorsed upon it the words, "Non-Forfeiture Endowment Policy," and the words "Non-Forfeiture Endowment Policy with Profits" appear upon the margin of the body of said policy.

Merrill T. Bruce, relying upon the above-recited stipulations and the words and expressions upon the back and margin of said policy, as above set forth, and the representations of said Farr, agent, to the same effect and understanding from them that if at any time he should cease to make payments of his premiums that the policy would not be forfeited, but that he should receive his share of the profits of said company during the time he should make payments, and the stipulation that after he had paid two or more complete annual premiums, they would on application convert his policy into a paid-up policy for as many tenth parts of the sum originally insured as there had been complete annual payments of premiums, decided to make no further payments of premiums and did on the 1st day of November, A. D. 1875, and within one year after default in payment of his premiums, transmit said policy to the said defendant company, and did make application for the conversion of said policy into a paid-up policy according to the terms of said contract. The said policy was received by the said company at its office in Hartford, Conn, on or before the 10th day of November, A. D. 1875, and within one year after his default in payment of his premium. There was no correspondence or communication between the company and the insured after November 10th, 1875, until he, Bruce, the insured, was in Hartford, in 1876, when the company delivered him his old policy, and never any correspondence or communication with said company by said Bruce, the insured, thereafter at any time. The defendant company have never issued to said Merrill T. Bruce or to the orator such paid up policy or tendered such policy to him or to any person for him, nor has the defendant in any way paid or satisfied, or offered to pay or satisfy the said Merrill T. Bruce or the ora-

tor for the interest of the said Merrill T. Bruce in said policy, or his rights under said policy except as follows :—

Upon receipt of Merrill T. Bruce's application for a paid-up policy, dated November 1, 1875, the insurance company replied, stating that there was outstanding against him four notes and interest amounting to \$190, upon the payment of which they would issue to him a \$400 policy at age 35 or at death prior to reaching age 35, but recommending that he surrender his said policy and take a new non-forfeiting and "participating in profits" policy for \$1,000, upon which the annual premium would be \$20.80, on which they would allow two premiums in advance and would return all the notes held by the company against him.

There was no further correspondence between Merrill T. Bruce and the company. A year or two later the insured went to the home office at Hartford and got his policy. There was no evidence offered as to what passed between the insured and the company. After the appointment of orator administrator he applied through his attorneys, Belden & Ide, to the insurance company for a paid-up policy for the sum due the insured, Merrill T. Bruce. No policy was forwarded or promised.

On the 15th day of December, 1873, and prior to said Merrill T. Bruce's default in payment of his premium under his policy, the said insurance company in accordance with a vote of its directors, taken at their meeting held December 2, 1873, issued a circular dated on said 15th day of December, 1873, notifying its policy-holders of a change of plan of said company in conducting their business by which change the company abandoned the percentage plan and adopted in its stead a plan "based upon the actual contribution to surplus by the policies participating, with a view to making an annual distribution of surplus upon all policies instead of deferring the same four years." Setting forth that the reason of above action is that "the experience of this company and the experience of other companies, older, carefully managed and successful, has demonstrated the impracticability of sustaining a yearly dividend of 50 per cent upon life, and 40 per cent upon endowment policies, such as this company has sustained during the past six years, and which it is the last of all the companies to abandon," and further setting forth reasons why the action of said company in adopting the change would conserve the interests of the policy-holders. This circular is marked orator's exhibit No. 5, and is attached to and made a part of this report.

It was claimed by the orator that this change of plan was a prominent reason why Merrill T. Bruce decided to make default in payment of further premiums upon his policy. Another reason was because Farr told insured that the premiums after the first premium would grow smaller, while in fact they did grow larger.

IDE & STAFFORD, *for Orator.*

CHARLES W. PORTER, *for Defendant.*

POWERS, J.

It is quite clear that much inadmissible evidence was received by the master in the hearing before him. The testimony of Blodgett and Dewey and certain exhibits offered in connection therewith were objected to by the defendant, but the objection is not available in this court. Sec. 730 R. L. declares that "no questions in regard to the admission or rejection of evidence by the masters shall be heard in the supreme court, unless such objection is made by exception, duly filed, to the report, in the court of chancery." No such exception was filed in this case and we must give effect to the statute as it reads.

The first question arising upon the master's report is whether the policy in question has been forfeited so that the right to a paid-up policy has been lost.

The annual premium payable on Bruce's policy in advance was \$104.86. Under the rules of the company this could be paid in cash, or one-half in cash and the other half by note running one year, the interest thereon being paid in advance.

Bruce paid his annual premiums on the half-cash and half-note plan for four years and then claimed a paid-up policy for four-tenths of the sum insured.

It was represented to Bruce before taking his policy by Farr, the company's agent, and by circulars issued by the company, that the policy would be non-forfeitable after the payment of two annual premiums. In one of the circulars the company uses this language. "Should future payments cease after not less than two have been made, the policy is not void, but remains binding by its terms without further payment of premiums for as many tenths * * * of the sum insured as there have been annual premiums paid. The non-forfeiture policies of the company are so written that the payment of two annual premiums render them binding for the amount of the insurance paid for, without further attention on the part of the

holder, thus obviating all possible danger of loss either through inattention or inability to meet subsequent payments."

When the policy was issued it provided in its 3d condition that "if the assured shall not pay the said annual premiums on or before noon of the several days hereinbefore mentioned for the payment of the same and the interest annually in advance on any outstanding premium notes which may be given for any portion thereof, or shall not pay at maturity any notes or obligations given for the cash portion of any premium of part thereof, then and in every such case, this policy shall cease and determine, and said company shall not be liable for the payment of the sum insured or any part thereof, except as hereinafter provided. The 4th condition then follows, "That if, after the receipt by this company of two or more annual premiums upon this policy, default shall be made in the payment of any subsequent premiums when due, then notwithstanding such default, this company will convert this policy into a paid-up policy for as many tenth parts of the sum originally insured as there shall have been complete annual premiums paid when such default shall be made."

The language of these conditions leaves no doubt as to the right of Bruce to a paid-up policy for four-tenths of the sum for which he was insured. If the language was ambiguous, Bruce had the right to construe it as the company had declared its meaning in the circular above referred to. But we think it needs no extraneous aid in its construction.

The very end aimed at in offering and receiving the reduced or paid-up policy is, as the company's circular declares, to obviate "all possible danger of loss." The paid-up policy issues as a redemption from a forfeiture of the original policy which otherwise would "cease and determine," for non-payment of premiums. It can issue only in case two full premiums have been paid, and if so many have been paid, the right to it is given to the policy-holder by the original policy itself. Thus his right to it is a contract right that inheres in the original policy. When issued it is not in itself subject to forfeiture for future non-payment of premiums. If any are payable in cash, notes, or interest, the company must stand for their collection on the promise of the policy-holder to pay. If the paid-up policy could be forfeited for future non-payment of premiums, it becomes a delusion and a snare. The policy-holder is no better off than before, so far as the risk of forfeiture is concerned. May on Insurance, Secs. 345 and 363. The paid-up policy issues for so many tenths of the sum insured as annual payments have been made

and is based on the theory that insurance to such amount has been fully paid for.

When Bruce elected to stop his payments he was at once entitled to have his policy converted into a paid-up policy freed of all risk of forfeiture for non-payment of future premiums. Such paid-up policy would not mature, however, till the end of the twelve years it had originally to run unless Bruce sooner died. At maturity of the policy the company had the right, by the terms of the policy, to deduct from the sum payable all indebtedness due the company on account of the policy.

In the case of *Mary A. Cowles vs. this same company*, Vol. 1. N. E. Reporter, Rochester Ed., 247, the precise question here made arose upon the same kind of a policy. The company claimed that the reduced or paid-up policy had been forfeited by the non-payment of interest on three premium notes. Says Doe Ch. J. : "The forfeiture claim qualified by the provision for a 'paid-up' policy does not mean that the reduced, 'paid-up,' 'non-forfeiture' insurance is annually forfeitable for non-payment." And again, "The original contract did not make the non-payable forfeiture claim applicable to the promised 'paid-up' policy into which the original could be converted."

The master says that the company regarded notes given for part of the annual premiums as loans made to the policy-holder. Upon its own theory then, a failure to pay interest on such notes does not work a forfeiture: May on Insurance, Sec. 345 and cases cited.

The case at bar is unlike *Patch vs. Ins. Co.*, 44 Vt, 481. There the question arose upon the construction of a paid-up policy, issued in place of a former one surrendered, which contained an express stipulation that certain sums of interest should be paid in advance. The action was assumpsit on the paid-up policy, and no question was made whether the paid-up policy was such in form as the insured was entitled to, such as it was he accepted it, and the action was upon it in the form it was issued and accepted.

The orator being entitled to a paid-up policy, the question next arises as to its amount.

The time for the maturity of the policy having arrived, to avoid circuity of action a decree may be passed for the part payment of the amount of the policy to which the orator is entitled. Equity will treat that as already done which should have been done.

The defendant is entitled to deduct from the \$400, which the paid-up policy should have issued for, the outstanding notes and

interest thereon held by it, less any dividends or profits in its hands that properly belong to such policy. The policy itself is described in the margin as a "non-forfeiture endowment policy with profits." But the policy is silent respecting the meaning of "profits" in this indorsement, and we are left to ascertain the meaning from other sources.

Farr represented to Bruce that the profits to which he would be entitled would come in the way of dividends which would be payable after four annual premiums had been paid, and that if he took a paid-up policy, the dividends would be applied when he took such policy. The question is not what profits the company ought to have earned, but what in fact it did earn. The company was bound to conduct its business in a way to preserve its solvency. It owed this duty to all classes of its policy-holders, and Bruce, as one of them, had no right to share in any plan of distribution of profits that worked insolvency. When the company then discovered that the percentage plan was disastrous to the common interest of the policy-holders, it became a duty grounded in the very theory of insurance to adopt some other plan that would best subserve the interests of all persons for whom it acted.

The change to the contributive plan was warrantable, and Bruce was entitled to dividends made under it of \$24.57 for four years.

The decree is reversed and the cause remanded with directions to enter a decree for the orator to the effect that he is entitled to a paid-up policy on the life of his intestate for the sum of \$293.91 as of December 30, 1882, and to avoid circuitry of action that the defendant be ordered to pay the orator said last-mentioned sum with interest thereon from December 30, 1883, with costs of suit.

SUPREME COURT OF OHIO.

Error to the District Court of Ross County.

CONNECTICUT MUTUAL LIFE INS. CO. }

vs. }

PYLE.* }

The provisions of a life insurance policy are construed and applied like the terms of any other contract, and such provisions may render the policy void, ab initio, by the terms of the same and the failure of warranty.

When a life policy is issued and accepted upon the expressed condition that the answers and statements of the application are warranted true in all respects, and that if the policy be obtained by any untrue answer or statement, or by any fraud, misrepresentation, or concealment, the policy shall be absolutely null and void;" and, as to matters material to the risk, some of the answers and statements are untrue in fact, though made without actual fraud and under an innocent misapprehension of the purport of the questions and answers; no contract of insurance is thereby made, and the policy does not attach, but it is void, ab initio.

When, for such a policy, premium has been paid by the applicant to the insurance company, such payment may be recovered back.

August 1, 1878, Jeremiah Pyle brought suit against the Connecticut Mutual Life Insurance Company, to recover back the premium paid for a policy that the company had canceled.

Pyle in his petition says: That on August 21, 1872, the defendant, by its agent, one John A. Nipgen, duly authorized to take applications for life insurance in the company of defendant, and to receive the cash premium thereon, applied to plaintiff at his home, "Pyle Farm," in Ross County, and requested him to take a policy of insurance in defendant's company upon the life of plaintiff. At first

* Opinion filed, Jan. 26, 1886.

plaintiff refused to do so on account of having no money, when Nipgen offered to advance to or loan plaintiff the money to make the first payment on the policy, to which proposition plaintiff acceded, and then told Nipgen that he, plaintiff, had failed in getting a policy of insurance in June, 1871, in the Charter Oak Insurance Company, of which Mr. Schutte was agent, on account of something being the matter with his pulse. Nipgen then asked plaintiff if the application had been sent to the company. Plaintiff replied that it had not as he knew of, to which Nipgen responded that if it had not gone any further than that, it did not make any difference; and thereupon plaintiff agreed with defendant, acting by its agent, to make application for a policy of insurance upon his life in defendant's company for the sum of ten thousand dollars, the same to be paid at the office of defendant in Hartford, Connecticut, to Ede Pyle, wife of plaintiff, if she survived him; if not to the children of plaintiff, or their legal representatives, etc. The said Nipgen, having a blank application, then commenced asking plaintiff the questions required to be asked of an applicant by the "statement of particulars respecting the person whose life is proposed for insurance, and which statement forms a part of the contract of insurance," and which are the same questions attached to the policy afterward issued by defendant, and plaintiff answered them until Nipgen came to the question: "Has any company ever declined to grant insurance on your life?" when he, said Nipgen, said he would just answer that question "No." Plaintiff told him "it was something he knew nothing about; that he could do just as he pleased about that." Said Nipgen thereupon put down, in answer to said question, "No." Plaintiff and Nipgen on the same day went to Hallsville to Doctor Gildersleeve, who, owing to the absence of the regular examining physician of the defendant, examined plaintiff, and thereupon Nipgen told Gildersleeve to answer all the medical questions "No," meaning the "questions to be answered by the medical examiner of the Connecticut Mutual Life Insurance Company," and they were so answered. Plaintiff then signed said application for his wife and himself as required, and executed his note, payable to the order of Nipgen at the First National Bank of Chillicothe, Ohio, four months and ten days after date, for the sum of \$219.20, with interest, being the amount of "cash premium" required to be paid, and which note having been indorsed by Nipgen, plaintiff afterward at maturity paid. The application was sent to the company and a policy, No. 119,633, of date August 31, 1872, in said amount on plaintiff's life, issued, and shortly

afterward delivered to plaintiff. Upon reading the policy, about a month afterward, plaintiff found it contained, among others, the following conditions and agreements :—

"This policy is issued and accepted upon the following express conditions and agreements: 1. That the answers, statements, representations, and declarations, contained in or indorsed upon this application for this insurance—which application is hereby referred to and made part of this contract—are warranted by the insured to be true in all respects; and that if this policy has been obtained by or through any fraud, misrepresentation, or concealment, that this policy shall be absolutely null and void. * * * 4. That in every case in which this policy shall cease and determine, or shall become null and void, all premiums paid in respect of the same shall be forfeited to the company."

At the foot of the application, and a part thereof, is the following :

"It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; and it is acknowledged and agreed by the undersigned that this application shall form a part of the contract of insurance, and that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentations or concealment of facts, then any policy granted upon this application shall be null and void; and all payments made thereon shall be forfeited to the company."

Plaintiff then called on Nipgen, and referring him to the terms of the policy, told him that he thought it was of no account, owing to the answer "No" to the question whether any company had ever declined to grant insurance on his life. He said that the plaintiff should bring the policy in and get it corrected, and that he would write to the company about it.

Plaintiff took the policy to Nipgen and Nipgen wrote to the company stating that said question should have been answered "Yes," instead of "No," and stated how far the Charter Oak matter had gone in plaintiff's case. Plaintiff signed the letter, and Nipgen mailed it. About three or four weeks afterward, plaintiff inquired of Nipgen about the matter, and was told that the company had said that plaintiff had better go before Doctor Searce and be re-examined. About a week after plaintiff did so, and was asked about his heart, and answered that it bothered him sometimes; that after working hard he got weak and nervous sometimes; that he took whiskey and ginger for it. Plaintiff left, and they made out the application. Plaintiff called on Nipgen repeatedly about the matter,

and he claimed that he had not yet heard from the company; then about two months after, that the application, meaning the new or corrected one, had been mislaid in the Cincinnati office of defendant. Then Nipgen and Searce made out another application and sent it on. This was the third application, and was made without the knowledge of plaintiff. When plaintiff again called on Nipgen, he was informed by him that the company had declined his application.

There were attempts to get a new or corrected policy in place of the original one.

On August 1, 1873, or thereabouts, plaintiff informed Nipgen that he was ready to make payment whenever he, Nipgen, would get it fixed. The defendant, upon receiving the third application, and without the knowledge or consent of plaintiff, canceled and annulled said policy of August 31, 1872. This was, as plaintiff thinks, at about the expiration of one year from the time it was issued. Upon being informed of said cancelation of said policy, some time in September, 1873, the precise time not now remembered, plaintiff demanded from said agent and said company the repayment of his money so paid as premium, which was refused.

Wherefore plaintiff prays judgment against said defendant for said sum of \$219.20, with interest thereon, from August 31, 1872; or if the court shall be of opinion that an action to recover back the money paid is not the proper action, then that the plaintiff may recover from the defendant the sum of \$500, his damages herein sustained; or that defendant, upon being paid the back premiums on said policy, may be ordered to rescind the cancellation and annulling of said policy, and to correct the same as to said answer mentioned, according to the fact, and for other proper relief.

A demurrer to this petition was overruled, and the insurance company answered, denying that plaintiff "told Nipgen that he, plaintiff, had failed in getting a policy of insurance in June, 1871, in the Charter Oak Insurance Company, of which Mr. Schutte was agent, on account of something being the matter with his pulse;" that "Nipgen then asked plaintiff if the application had been sent to the company;" that "plaintiff replied that it had not as he knew of, to which Nipgen responded that if it had not gone farther than that it did not make any difference," and says that no such conversation took place between the plaintiff and said Nipgen; also the company denied other specific allegations, but it did not deny that its agent, Nipgen, wrote the application.

To this answer plaintiff replied, denying some specific allegations

of the answer. On the trial, by request of defendant, the court found as its conclusions of fact that in addition to the facts admitted by the pleadings, that several of the answers to questions contained in the application of the plaintiff, on which the policy of insurance was issued, were erroneously answered, which answers were, by the terms of the policy, made warranties; but the court further finds that all of said questions so erroneously answered, were answered by the plaintiff under an innocent misapprehension of the purport of the questions and the answers, and the answers that should have been made thereto, and without any intent to perpetrate a fraud of any kind upon the defendant. The court further finds that the untruth of several of said answers was upon questions material to the risk, and that by the terms of said policy and the application which became and was a part thereof, the untruth of said answers constituted breaches of the warranties in respect thereof contained in said policy, and that by its terms the breach of said warranties was to make said policy null and void.

The court finds as conclusions of law that the plaintiff is not entitled to have the cancellation of said policy of insurance set aside, nor to have the same reformed in any particular, and that the same is wholly void and of no effect whatever, and was so from the moment it was issued.

The court further finds as a conclusion of law that the plaintiff is entitled to recover of the defendant the sum of \$219.20, the premium paid, with interest from the 21st day of August, 1872, to which the defendant, by counsel, excepted.

A motion for a new trial was overruled and the ruling excepted to; and judgment was entered for Pyle. The district court affirmed this judgment, and plaintiff in error now seeks to reverse these judgments.

LAWRENCE T. NEAL and VANMETER & THROCKMORTON, *for Plaintiff in Error.*

CLARK & McDUGAL, *for Defendant in Error.*

FOLLETT, J.

In filling up the application for this policy, Nipgen was the agent of the insurance company and was not the agent of Pyle: Insurance Co. vs. Williams, 39 Ohio St., 584. And though the application was thus made, the policy was canceled for its untrue statements, innocently made on the part of Pyle.

The application and the policy together form the contract. The

terms of the contract are plain and free from doubt or ambiguity. It is agreed in the application "that this application shall form a part of the contract of insurance, and that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentations or concealment of facts, then any policy granted upon this application shall be null and void."

And the policy provides that: "This policy is issued and accepted upon the following express conditions and agreements: 1. That the answers, statements, representations, and declarations, contained in, or indorsed upon the application for this insurance—which application is hereby referred to and made part of this contract—are warranted by the insured to be true in all respects; and that if this policy has been obtained by or through any fraud, misrepresentation, or concealment, that this policy shall be absolutely null and void."

1. Did the policy ever attach or was it ever valid?

The court finds as conclusions of fact that "several of the answers to questions contained in the application of the plaintiff, on which the policy of insurance was issued, were erroneously answered;" and the "court further finds that the untruth of several of said answers was upon questions material to the risk, and that, by the terms of said policy and the application which became and was a part thereof, the untruth of said answers constituted breaches of the warranties in respect thereof contained in said policy, and that by its terms the breach of said warranties was to make said policy null and void."

And the court find as a conclusion of law that the policy "is wholly void, and of no effect whatever, and was so from the moment it was issued."

But the plaintiff in error insists that the policy took effect and was in force until it was canceled. To sustain such a claim would ignore the expressed terms of both the application and the policy, as well as the cause of the cancellation of the policy. These terms the plaintiff in error has never waived, but it has insisted upon them and acted upon the strict letter of the agreement, and has canceled the policy.

This is not a new question in the courts. In the case of *Clark vs. Man. Ins. Co.*, 2 Woodb. & M., 472, the court held: "A warranty is generally a stipulation made and described in the policy itself, and

must be complied with, whether material or not." Where a material fact is suppressed in such representations, the insurance is avoided, and the policy does not attach, whether the suppression happens by neglect or fraud."

In *Friesmuth vs. Agawam Mutual Fire Ins. Co.*, 10 Cush., 587, "the application contained an untrue representation that the property was unincumbered," and the court held "that the policy was wholly void." In *Foot vs. Aetna Life Ins. Co.*, 61 N. Y., 571, the court held: "If a policy of insurance declare that the statements made in the application shall be part and parcel of the policy, such statements become warranties and must be true, whether material or not."

"A contract of insurance, like other contracts, is avoided by an untrue statement by either party as to a matter vital to the agreement, though there be no intentional fraud or misrepresentation." *Co-operative Life Ass'n of Miss. vs. Leflore*, 53 Miss., 1.

On a similar contract the Supreme Court of the United States in *Jeffres vs. Life Ins. Co.*, 22 Wall., 47, held: "Any answer untrue in fact, and known by the applicant for insurance to be so, avoids the policy, irrespective of the question of the materiality of the answer given, to the risk." And in the opinion Mr. Justice Hunt says: "Nothing can be more simple. If he makes any statement in the application it must be true. If he makes any declaration in the application it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the company." And this is approved in the case of *Aetna Life Ins. Co. vs. France*, 91 U. S., 510, and there the court also held "that the company was not liable if the statements made by the insured were not true. The agreement of the parties that the statements were absolutely true, and that their falsity in any respect should void the policy, removes the question of their materiality from the consideration of the court or jury."

This court, in *Union Mutual Life Ins. Co. vs. McMillen*, 24 Ohio St., 67, held: "Where a life policy is made and accepted upon the expressed condition that if the annual premium is not fully paid within the time specified, the policy shall be null and void, and wholly forfeited, the failure to pay the premium avoids the policy;" and that was where the policy had attached. But in such a case, in *Insurance Co. vs. Bernard*, 33 Ohio, 459, the court held, where "the uniform custom of the insurance company has been to give notice of the time when the premiums fall due, and to collect the same at

the residence of the policy-holder, through a local agent residing in his neighborhood, good faith requires that this mode of collection should not be discontinued, and payment required at the company's office, without notice to the insured."

There are mistakes in policies that may be disregarded or corrected, and the policy enforced. See *Harris vs. Columbiana Co. Mut. Ins. Co.*, 18 Ohio, 116; *Insurance Co. vs. Williams*, *supra*. But in this case the court did not err in holding the policy "is wholly void and of no effect whatever, and was so from the moment it was issued."

2. Should the premium be returned?

The court finds as a conclusion of law that Pyle is entitled to recover of the insurance company the premium paid, with proper interest. The court thus held, not only because the policy was void ab initio, but because it also found "that all of said questions so erroneously answered, were answered by the plaintiff under an innocent misapprehension of the purport of the questions and the answers, and the answers that should have been made thereto, and without any intent to perpetrate a fraud of any kind upon the defendant."

There was no actual fraud, at least on the part of Pyle.

On this policy no risk ever attached.

In 1877, in the case of *Lyrie vs. Fletcher, Cowp.*, 666, 668, Lord Mansfield stated the general rule to be: "That where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned. Because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured, and whatever cause it be owing to, if he does not run the risk, the consideration for which the premium or money was put into his hands, fails, and therefore he ought to return it."

In 1800, in the case of *Delavigne vs. United Ins. Co.*, 1 John. Cas., 310, the court held: "Where a policy becomes void by a failure of the warranty, the insured is entitled to a return of the premium, if there be no actual fraud."

"Where a policy is avoided by concealment or by misrepresentation not fraudulent, the assured is entitled to a return of the pre-

mium, and the policy is conclusive evidence of the receipt of the premium by the insurer :” *Anderson vs. Thornton*, 8 Exch., 425.

And such is now the general rule. See 3 Kent, 341; *May, Ins.*, § 4.

The rule is different where the risk has attached, or there is actual fraud.

Yet it is urged here that “ we must leave the premium paid by the insured to be disposed of according to the terms of his contract with the insurer.” No such terms exist.

There is no contract between Pyle as the “insured” and the company as the “insurer.” Under this policy Pyle never was insured, and the company never was an insurer of Pyle. The policy has always been void, and this claim, based on the contract, is as void as the policy. From all that appears, Pyle was not in fault, and the agent should not have obtained the premium, and the insurance company should not retain Pyle’s money.

Of course we have not considered how far the provisions of such a policy may be waived by the acts of the parties, nor to what extent such parties may be bound by their subsequent acts and in connection with such provisions, and what was done in procuring such application and policy.

The court did not err, and the judgment is affirmed.

UNITED STATES CIRCUIT COURT OF COLORADO.

EDWARD A. SPERRY ET AL.

vs.

SPRINGFIELD FIRE & MARINE INS. CO.*

The policy which was originally on stock in a building used as a store, was subsequently extended to cover stock in an adjoining building used as a warehouse. The policy provided that it should be void if among other things nitro-glycerine should be kept.

Held, That dynamite or giant powder was nitro-glycerine within the meaning of the policy,

Held, That the keeping of such dynamite in the warehouse avoided the policy.

Held, That such a provision cannot be waived by a parol agreement at the time of application.

Held, That a custom as to keeping cannot prevail against a direct prohibition in the policy.

WELLS, MACON & McNEAL, *for Plaintiffs*.

MARKHAM & DILLON, *for Defendants*.

HALLETT, J. (orally).

Edward A. Sperry and others, partners under the name of Sperry Brothers & Co., doing business at Garfield, in this State, brought suit against the Springfield Fire & Marine Insurance Co. on a policy issued to them on the 23d day of November, 1882, for the sum of \$1,000. The loss occurred in the month of October, 1883, within the life of the policy. The policy as originally issued described only a building used as a store by plaintiffs in the town of Garfield; on the 26th of March, 1883, the policy was extended so as to cover stock in an adjoining building used by plaintiffs as a warehouse. The argument in respect to that matter is set up in the answer, and

* Decision rendered, January 29, 1886.

is as follows : "The portion of the within stock having been moved into the one-story, frame building connecting with the original location, this policy is made to cover said stock now in the two buildings connecting." That is all of the subsequent agreement relating to the stock in the warehouse, so that after this extension of the policy the covenants and agreements, and all the provisions of the policy must be taken to relate to the warehouse as well as to the building in which the store was kept and which alone was specified in the policy as originally drawn.

This policy contained a clause quite usual in such instruments, avoiding the policy if certain things should be done by the insured, amongst other things this was specified :—

If the assured shall keep gunpowder, fireworks, nitro-glycerine, phosphorous, saltpeter, nitrate of soda, petroleum, or any of its products, naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid, chemical oils, without written permission in this policy, then and in every such case, this policy is void.

The question arises upon the clause so far as it relates to nitro-glycerine. It is fully established in the evidence that there was a large quantity of what is called dynamite or giant powder in the warehouse attached to the main building, and which was brought within the terms of the policy by this agreement of March 26, 1883. If dynamite or giant powder is to be regarded as nitro-glycerine, then the keeping of it was forbidden by this provision of the policy. I understand the position of the plaintiffs to be that it cannot be so regarded; that it is a distinct and separate article from nitro-glycerine, and the policy cannot be avoided unless it was expressly named in the policy as dynamite or giant powder. It appears in evidence also, and it sufficiently appears also from the definitions given of dynamite, that the effective agent in that compound is nitro-glycerine, I have not found giant powder mentioned in any of the dictionaries or works to which I have been able to refer on that subject. In the edition of 1860 of the American Encyclopædia, neither nitro-glycerine nor dynamite are mentioned. In the last edition of the Encyclopædia Britannica, dynamite and nitro-glycerine are each mentioned, and something of the history of them is given.

First as to nitro-glycerine, it is said here that it was discovered by Sobrero in 1846. Then the elements of it are given, and how it is made, and some description of it. "The first attempts to utilize the explosive power of nitro-glycerine were made by Nobel in 1863;

they were only partially successful until the plan, first applied by General Pictot in 1854, of developing the force of gunpowder in the most rapid manner and to the maximum extent through the agency of an initiative detonation, was applied by Nobel to the explosion of nitro-glycerine. Even then, however, the liquid nature of the substance, though advantageous in one or two directions, constituted a serious obstacle to its safe transport and storage, and to its efficient employment; it was therefore not until Nobel hit upon the expedient of producing plastic, solid preparations by mixing a liquid with solid substances in a fine state of division, capable of absorbing and retaining considerable quantities of it, that the future of nitro-glycerine as one of the most effective and convenient blasting agents was secured; charcoal was the first absorbant used, eventually the silicious (infusorial) earth, known as "kieselghur," was selected by Nobel as the best material for producing dynamite (which see), as it absorbs after calcination from three to four times its weight of nitro-glycerine and does not part with it easily when the mixture is submitted to pressure or frequent alterations of temperature." Then in the conclusion of the article he says: "The most recent and most perfect form in which nitro-glycerine is now used is called blasting gelatin. This material, also invented by Nobel, is composed of the liquid and of a small proportion of so-called "nitro-cotton," which consists chiefly of those products of the action of nitric acid on cellulose which are intermediate between collodion-cotton and gun-cotton; * * * * * blasting gelatin is rapidly replacing dynamite in some of its applications, and is already extensively manufactured in different countries." At the head of this article the synonyms of nitro-glycerine are "glonoin, glonoin oil, dynamites, blasting gelatin."

In the article entitled dynamite, there is some reference to the substances used for compounding them. In this article it is stated that the first application of it was made by Nobel in 1863, who used gunpowder soaked with it for blasting. Then the use of kieselghur is referred to, and further on it is said that: "Another defect is its liability to part with a portion of its nitro-glycerine, especially when in contact with porous substances, such as the paper of cartridges and wrappers. That for the manufacture of dynamite the best absorbents are kaolin, tripoli, alumina, and sugar; the last like alum. The material employed in Mr. Horsley's preparation has the advantage of being separable from associated nitro-glycerine by solution in water. Dynamite as made by M. P. Champion, con-

sisted of twenty to twenty-five parts of nitro-glycerine, with seventy-five to eighty parts of finely pulverized, burnt clay from glass works; and in some explosives sold as dynamite, a mixture of sawdust and chalk is substituted for silicious substances."

From what is stated here, it is apparent that almost anything which will take up the nitro-glycerine and hold it until it may be needed for use in the proportion of one-fourth or one-fifth of the whole quantity will make an explosion of this kind; and it is quite natural that each manufacturer or each person who may discover a new agent for conveying it should give it a new name, as in this article on nitro-glycerine in this volume of the *Encyclopædia Britannica*, names are given which are not in use at all in this country. I have looked in the last edition of Webster's dictionary, and "glonoin, glonoin oil, and blasting gelatin, are not referred to at all; and yet in this article it is said that blasting gelatin is regarded as the best form in which it can be used, and the names which are in common use in this country as giant powder, Atlas powder and Hercules powder, and the like, are not found in the last edition of the dictionary—all of these substances are of such recent discovery and use that it has only been within a few years that they have come into the books at all. Dynamite is not defined in the edition of Worcester's dictionary of 1870, and nitro-glycerine not in any of the dictionaries to this day; it is only in scientific works and in encyclopædias. That is certainly the first word that was adopted to describe this agent as derived from nitric acid and glycerine, and it seems to me to be perfectly clear that whatever new names may now be given to the various compounds in which nitro-glycerine is the active and effective force, that they are all well enough described in a policy of insurance by the term nitro-glycerine. It is pretty certain that some of these names which are now in use were not known at the time this policy was issued, only two or three years ago. Dynamite was then known, and perhaps was in more general use to describe this substance than nitro-glycerine, but as nitro-glycerine is the base and the force which is used in this explosive, I think that it must be said that any of these compounds are meant by the use of that name in a policy of insurance; so that the keeping of this giant powder or dynamite, or by whatever name it may be known, in this storehouse, was forbidden by this policy. In that feature it differs from some other cases that were tried in this court, in which judgment was rendered for the plaintiffs, inasmuch as this policy covers the warehouse, and the other policies did not relate to a warehouse.

It was thought in those cases that inasmuch as the companies had forbidden the keeping of nitro-glycerine in the store, and had not inserted any provision in the policy as to keeping it near the store, they could not complain of the circumstance that it was kept in a building adjoining the store; but if giant powder and dynamite as described by the witnesses are nitro-glycerine, it is directly forbidden by the terms of this policy, and the policy declares that the keeping of such an article will make it void; that is the result unless there was some permission given at the time of the issuance of the policy which would come within the terms of the clause which I have read. As to that, it is to be observed that the policy provides that these articles are not to be kept without written permission in the policy. It is said that a Mr. Pomeroy, who examined the premises with a view to other policies on the same stock some time prior to the date of this policy, was notified that dynamite was kept in the store, and that he expressly consented that it should be kept there. There is some question whether he was then acting as the agent even of the other companies who issued policies at that time, and whether this company can be affected by what he said at that time in respect to keeping dynamite.

If, however, this policy is not to be affected by any parol agreement made at the time of the application for any policy, it is immaterial and not necessary to consider whether he made such an agreement or not. In my judgment a provision of this kind in the policy cannot be waived or in any manner affected by a parol understanding at the time of the application for the policy, even if it is explicit and direct. In terms the policy provides that these things shall not be kept without written permission in the policy. On that subject there is a case in 15 Wallace, 664, *Insurance Co. vs. Lyman*. The point decided is not exactly that which arises in the case at bar, but the remarks of Mr. Justice Miller are to the point: "Undoubtedly a valid verbal contract for insurance may be made, and when it is relied on and is unembarrassed by any written contract for the same insurance, it can be proved and become the foundation of a valid recovery as in all other cases where contracts may be made either by parol or in writing. But it is also true that where there is a written contract of insurance, it must have the same effect as the adopted mode of expressing what the contract is, that it has in other classes of contract, and must have the same effect in excluding parol testimony in its application to it that other written instruments have." And further on in the same opinion: "We think

it equally clear that the terms of the contract having been reduced to writing signed by one party and accepted by the other at the time the premium of insurance was paid, neither party can abandon that instrument as of no value in ascertaining what the contract was, and resort to the verbal negotiations which were preliminary to its execution for that purpose.

The doctrine is too well settled that all previous negotiations and verbal statements are merged and excluded when the parties assent to a written instrument as expressing the agreement." I understand that to be the rule in this class of cases as well as in others; whatever took place between Mr. Pomeroy and these plaintiffs at the time the negotiations for this policy took place, assuming that he was agent of the company at that time, or at the time of the negotiation for any other policy is not to be shown in opposition to the express language of the policy. There was evidence also tending to prove that giant powder and such explosives were kept in stores of this kind in the mining districts, and a custom of that kind was relied on as relieving the plaintiffs from the provisions of the policy. In respect to any such custom, if it prevailed, that also was subject to the rule which obtains in respect to any parol agreement which may have been made affecting the terms of the policy. In *Grace and another vs. American Central Ins. Co.*, 109 U. S., 278, it is said that "An express written contract embodying in clear and positive terms the intention of the parties, cannot be varied by evidence of usage or custom. In *Barnard vs. Kellogg*, 10 Wall., 383, this court quotes with approval the language of Lord Lyndhurst, in *Blackett vs. Royal Exchange Assurance Co.*, 2 Crompton & Jervis, 244, that 'usage may be admissible to explain what is doubtful; it is never admissible to contradict what is plain.' This rule is based upon the theory that the parties, if aware of any usage or custom relating to the subject-matter of their negotiations, have so expressed their intention as to take the contract out of the operation of any rules established by mere usage or custom." Of course if the plaintiffs were forbidden to keep this article by the terms of the policy, they cannot bring in a custom or usage as avoiding that prohibition of the policy. If there is any such custom it cannot prevail against the express language of the policy; and if there was such a custom it could not relate to the quantity which was shown to have been kept on the premises. It was testified by the clerk that there was 400 pounds; Mr. Fulton testified that Mr. Sperry stated that there was 700 pounds. Mr. Sperry, when his attention was called to it, conceded

that he had said something about dynamite, but did not admit that he had said it would avoid the policy; but he said nothing as to the quantity, apparently admitting that there may have been 700 pounds. The keeping of such a quantity of so dangerous a substance in such a place as that was a remarkable act of carelessness; it was dangerous to the whole community to have such stuff as that in such quantity in a place where people are passing and repassing, and going in and out of the store to trade.

I think plaintiffs are not entitled to recover.

The judgment will be for defendant.

SUPREME COURT OF WISCONSIN.

FITZGERALD, ADM'X,

VS.

CONNECTICUT FIRE INS. CO.*)

The dwelling insured was only occupied by hands employed on the farm at such times as they were working in the neighborhood, and for the purpose of cooking their meals and sleeping.

Held, That it was not occupied within the meaning of the policy.

An explanation to the agent which would leave him to infer that the building was as a usual thing to be occupied by the farm hands, and which led him to indorse "now occupied for dwelling and farm purposes," would not waive the provision against vacancy.

JAMES FREEMAN and GABE BOUCE, *for Plaintiff.*

J. W. LUSE, *for Defendant.*

COLE, C. J.

This is an action upon a policy of insurance. The policy was issued November 22, 1880, on a dwelling-house, frame granary, and horse-barn—three separate buildings—for the term of three years. The policy stated that the premises were occupied by a tenant. The tenant remained on the premises for a year or more and then left. It is practically conceded that the buildings were vacant and unoccupied for some time thereafter. The policy contained the condition that if the premises became vacant or unoccupied, and so remained for more than ten days, without notice to and consent of the company in writing, it should be void. On the 20th of June, 1883, the assured went to the agent of the company and said this, to use his own words: "I came in to Mr. Lawson, and told him that I was not going to leave a tenant in the house any more; that I

* Opinion filed, December 1, 1885.

couldn't work the farm and keep the tenant there ; that I had to have my own men there while I was putting in the crops and taking it out and cutting the hay. I kept my cattle there all the time, and there was no use of my keeping it insured unless I could keep it insured in that way. He said he would sooner have it that way than have a tenant in, so he indorsed on the policy in that way. He put that indorsement on there, and said that would make it all right. I explained to him at that time that I wanted my men to go there and put in the crops and take it out, and also cut the hay and do the plowing, the same as we had to do on any farm. I told him my men had to go from one place to the other, and while we were there we wanted to live in that house, and that was the way it was going to be occupied—that way and no other. That is the precise way I stated." The agent then indorsed on the policy this writing: "June 20, 1883. It is understood that the buildings insured hereunder are now occupied for dwelling and farm purposes. H. L. Lawson & Bro., Agts." The assured lived about two miles distant on another farm, and carried on the farm upon which the insured buildings were situated during the summer and fall of 1883, his men going back and forth, sometimes sleeping and eating in the insured dwelling-house, and there was some little household furniture therein. As to the kind or extent of occupancy of the dwelling, the assured further said: "All the occupancy there was, was while these men were there—while they were there to work. * * * When there was not anything being done on that farm there would be no men staying in the house at all. If they had no work to do there, there was nobody staying there at all. When there was work to do the workmen cooked and slept there, the same as the house where I live." This was the character of the occupancy, as appears from the plaintiff's own case. When there was work to be done upon that farm the men cooked, ate, and slept in the house. Often, when men were not at work there, some members of the family would go to the farm or to the house, go through it, and see if things were right. But it is not claimed, nor could it be on the testimony, that some person usually lived at the house, or stayed upon the premises and slept there. For periods of more than ten days there was no one in the house nights, and it was absolutely vacant and unoccupied as a dwelling-house.

A number of questions were submitted to the jury, to which answers were given. The fourth question was this: "Was the dwelling house insured unoccupied and vacant at any time after the indorse-

ment of June 20, 1883, and did it still remain vacant and unoccupied for above ten days at any one time?" To this question the jury answered in the negative, in the teeth of an instruction given that the term "occupied," within the meaning of the policy, means that the house must be habitually occupied; that is, somebody must have lived there and slept there habitually—not every night, but usually and ordinarily.

The ninth question was this: "After the 20th of June, 1883, was the said building occupied for dwelling and farm purposes?" This the jury answered in the affirmative. After a careful examination of the testimony it seems to me that both these findings are wholly unsupported by the proofs in the case. Certainly, the word "occupancy," as used in the policy, is not to be understood in any technical sense. It is not that occupancy or possession which follows the legal title, and which the assured might be said to have by reason of owning and cultivating the farm. It means something more than this. As applied to the dwelling, it is to be understood in the popular sense as defined in the following cases: "For a dwelling-house to be in a state of occupation there must be in it the presence of human beings as at their customary place of abode, not absolutely and uninterruptedly continuous, but that must be the place of usual return and habitual stoppage." *Folger, C. J., Herrman vs. Adriatic Fire Ins. Co.*, 85 N. Y., 169. "A dwelling-house and barn are unoccupied, within the meaning of an insurance policy which provides that buildings unoccupied shall not be covered by the policy, where the house is only used by the insured and his servants for the purpose of taking their meals there when engaged in carrying on a contiguous farm, and the barn is only used for the purpose of storing hay and farming tools." *Ashworth vs. Builders' M. F. Ins. Co.*, 112 Mass., 422. To the same effect are *Keith vs. Quincy M. Ins. Co.*, 10 Allen, 228; *American Ins. Co. vs. Padfield*, 78 Ill., 167. It is impossible to affirm that there was any actual use or occupation of the dwelling-house after the 20th of June, 1883, in this manner.

The fifth and sixth questions are as follows: "Did the plaintiff's intestate state to the agent of the defendant at the time the indorsement of June 20, 1883, was made, that it (the dwelling-house in question) was going to be used in the manner in which it was afterwards used?" (6) "Did the insurance agent assent to the building being used by the plaintiff's intestate as the testimony shows it was used?" Both of these questions were answered in the affirmative.

We have already given the testimony of the assured of "the precise way" he explained to the agent how he proposed to use and occupy the building and farm; and we think no one would suppose from what was then said that the dwelling-house was only to be occupied when the men were at work on the farm, and at all other times it was to be vacant and unoccupied, with no one living in it by day nor sleeping in it by night. On the contrary, we think the agent might well suppose that some one (not a tenant, but some member of the family of the assured) was going to live in the house, and would usually be in nights to look after it.

In answer to the tenth question the jury found that the building was used in accordance with the arrangement made between the assured and the agent on the 20th of June. We have shown from the testimony of the assured himself just what that understanding or arrangement was. No comment is necessary to point out the entire absence of proof to support the finding of a different arrangement.

The eleventh question was: "Does the indorsement of June 20, 1883, state the agreement and understanding between the agent and Mr. Fitzgerald as to how the insured building was to be thereafter used and occupied?" The answer was as follows: "Yes; we mean by 'yes' on question eleven that the premises were occupied as understood by the assured and the agent Lawson, at the time of the indorsement on the 20th of June, 1883." This answer is clearly an evasive one. The question admitted of a direct and unqualified answer, and the defendant was entitled to it: *Davis vs. Town of Farmington*, 42 Wis., 426. The learned circuit judge had stated, on submitting this question, that it had been claimed on the part of the plaintiff that the writing on the policy of June 20th did not express the whole agreement that was at the time made, but that there was some further understanding between the parties not expressed in the writing itself; and the circuit judge directed the jury that they were not to answer this question in the negative, unless satisfied beyond a reasonable doubt, by testimony that was clear and convincing, that the writing did not contain the whole agreement which was made at the time. Presumably, the writing contained the agreement or understanding of the parties. True, it is not very explicit, and seems to refer merely to the state of things existing when it was made. It reads: "It is understood that the buildings insured hereunder are now occupied for dwelling and farm purposes." The writing seems to relate to present, not future occupancy. But, if

construed in the light of the testimony of the assured, we should infer from it that he had some doubt whether the policy did not require an occupancy by a tenant ; perhaps he feared that it had already become forfeited by reason of non-occupancy. It does not appear that the assured communicated to the agent the fact that the buildings had been vacant and unoccupied for a year or more. The agent says he did not communicate to him that fact. But we are now considering the findings with reference to the plaintiff's case, seeking to ascertain what evidence there is to sustain them. If the agent made a mistake in reducing the agreement to writing, this doubtless might be shown by parol testimony. But we find no satisfactory evidence that any mistake was made. For, as we have said, the obvious, legitimate inference from the testimony of the assured is that the buildings were not to be occupied by a tenant longer, but that his men would occupy them while at work on the farm for farm purposes. But that there was to be an occupancy by some one seems to be fairly implied, as well from the testimony of the assured as the writing itself, so far as it bears upon the question.

The motion made by the defendant to set aside the findings of the jury, because contrary to or unsupported by the testimony, should have been granted. The judgment of the circuit court is reversed, and the cause remained for a new trial.

TAYLOR, J. (dissenting). The only material question in the determination of this appeal arises upon the construction of the indorsement made upon the policy of insurance by the agent of the company, as shown upon the trial. The property insured is a dwelling-house, granary, and horse-barn. The policy is for three years, and bears date November 22, 1880. When the policy was taken it was stipulated therein that the premises were occupied by a tenant, and there was a condition in the policy that if the premises became vacant or unoccupied, and so remained for more than ten days without notice to and consent of the company obtained in writing, it should be void. The proofs on the trial showed that previous to the 20th day of June, 1883, the tenant had left the premises, and they had been vacant and unoccupied for more than ten days without notice to or assent of the company. On the day last mentioned the insured came to the agent of the company with his policy, and, as he testifies, made the statement quoted in the opinion of the court filed in this case, and thereupon the agent made the following indorsement on the policy: "June 20, 1883. It

is understood that the buildings insured hereunder are now occupied for dwelling and farm purposes. H. L. Lawson & Bro., Agts."

As the jury were to judge as to the truth of the statement alleged to have been made by the assured to the agent of the company at the time this indorsement was made, and they having found that such statement was in fact made as testified to by the assured, it seems to me the indorsement must be construed in the light of such statement, and it is intended to so change the original policy as to permit the assured thereafter to occupy the property in the way he clearly indicated it would be thereafter occupied. If we consider this indorsement made to carry out the wishes and purposes of the insured as to the manner of occupying the premises insured thereafter, it seems to us quite clear that it should not be so construed as to acquire an actual and continued occupation of the dwelling-house thereafter, either by the insured or by some one in his employ.

The statement made clearly negatived the idea that the insured would occupy the insured dwelling in person, and the proofs show more clearly that there could not have been any such intention, or that the agent could have so understood the assured; as it appears, he had another and much larger farm, and a much more convenient and comfortable house, where he was then living with his family. Is it, then, fairly to be inferred that the insured was to keep the same constantly occupied by an employe, or some member of his family? If there was any understanding that it should be constantly occupied thereafter, it must have been that an employe, or some member of his family, should so occupy it, because the agent was informed that it would not be thereafter occupied by a tenant of the insured. To me it is sufficiently plain that the fair inference to be drawn from the statement made by the insured was that thereafter the buildings would not be constantly occupied by any one, but they would be so occupied only when he and his men were there on the farm at work putting in the crops or harvesting the same. He says: "I explained to him that I wanted my men to go there and put in the crop and take it out, and also cut the hay and do the plowing, the same as we had to do on any farm. I told him [the agent] my men had to go from one place to another, and while we were there we wanted to live in that house, and that was the way it was going to be occupied; that way, and no other." It cannot, I think, be fairly inferred from this statement that the insured intended to or did convey to the agent the idea that some one would be constantly in the actual occupation of the insured build-

ings within the ordinary meaning of those words ; and that the words of the indorsement may well be construed in the light of this statement to mean just such an occupancy as the assured stated they were to have, and that such occupancy would not be a continuous one, but would conform to the necessities and convenience of the insured in carrying on and working the farm on which they were situated.

While the findings of the jury are undoubtedly subject to the criticism made in the opinion of the majority of the court, still, if the indorsement be construed as I think it must be in view of the evidence, the inconsistencies of the findings are not fatal to the plaintiff's right of recovery, and ought not to reverse the judgment; or if the judgment should be reversed on account of the inconsistent and unsupported findings of fact by the jury, then it should be reversed for that reason alone, and not because, upon the whole evidence in the case, the plaintiff is not entitled to recover.

ORTON, J. I most respectfully concur in this dissenting opinion as expressing my views of the case.

SUPREME COURT OF INDIANA.

Appeal from the Marion Superior Court.

SUPREME COUNCIL OF THE ORDER
OF CHOSEN FRIENDS.

vs.

GARRIGUS.*

Where, in case of a claim according to the by-laws of a benevolent association, the matter is referred to a board of physicians, whose report then goes to a supreme medical examiner for a decision, and the official acts of the latter are reported to the supreme council, a member is not obligated in the absence of a special provision to that effect, to appeal to the supreme council before invoking the law.

A benevolent association cannot, by provisions in its constitution or by-laws, deprive a member of the right to resort to the courts to enforce his rights in respect to a claim.

At common law an affray must be fighting without premeditation by a number of persons. A mere statement without further facts that complainant was injured in an affray is a conclusion which will not meet the averment that he was injured without fault on his own part.

The fact that an injury was intentionally inflicted by another, if without fault on the part of the injured, will not prevent it from being an accident within the meaning of an insurance contract.

ZOLLERS, J.

Appellee brought this action to recover from appellant \$1,500, which he claims is due him under the charter, constitution, and by-laws of the order. The order was incorporated under section 3,502, Rev. Stat., 1881. Some of its principal objects, as declared in the articles of incorporation, are to unite its members in bonds of

* Decision rendered, December 8, 1885.

fraternity, aid, and protection; to improve the condition of the members morally, socially, and materially; and to establish a relief fund, from which members, who have complied with all its rules and regulations, or persons by such members lawfully designated, or the legal heirs of such members, may receive a benefit in a sum not exceeding \$3,000, which shall be paid either when a member reaches the age of seventy-five years, or when, by reason of disease or accident, such member becomes permanently disabled from following his usual or some other occupation, or upon satisfactory evidence of the death of such member and when all the conditions regulating such payment have been complied with. Among the general officers designated in the articles are a supreme councilor, a supreme recorder, a supreme treasurer, and a supreme medical examiner. Among the powers named in the articles, it is declared that the association shall have power to make and change its own constitution and laws, and to grant, revoke, and change constitutions for all grand and subordinate councils of the order, and to finally decide all matters and appeals pertaining to the order which shall be properly presented to it. The constitution adopted by the order provides for the same general officers, declares the same objects, and asserts the same powers. It is there declared that the order shall have power to grant charters for grand councils in any State, Territory, or country not under the jurisdiction of a grand council; that it shall have exclusive power to grant charters to subordinate councils, which shall be, until the formation of a grand council, under the immediate and direct jurisdiction of the order, the Supreme Council of the Order of Chosen Friends. There is another provision that the decisions of the supreme council on all matters pertaining to the order, and on all appeals properly presented, shall be final. The duties of the supreme medical examiner are defined as follows:—

The supreme medical examiner shall carefully examine all reports and papers relating to the permanent disability of a member of the order, and render a decision thereon. He shall examine and report on all medical examinations referred to him, and perform such other duties as the laws and usages of the order require. He shall submit at each annual session of the supreme council, a written report of all his official acts during the recess.

It is further provided that grand councils shall have no control of the relief fund. Among the committees provided for by the by-laws of the order, is a committee on grievances. The duties and powers of this committee, as fixed by the by-laws, are as follows:—

The committee on grievances and appeals shall examine all cases of grievances coming before the supreme council by appeal or otherwise, and report their opinion, together with a distinct statement of all questions at issue, to the supreme council.

The relief laws adopted by the order provide for the creation of a relief fund. One section of these laws provides that, upon permanent disability, one-half of the amount named in the relief-fund certificate held by the member shall be paid to him at once, another section is as follows:—

Should a member become permanently disabled from following his or her usual or other occupation, by reason of disease or accident, on receipt of the proper notice the supreme council shall order a board of three physicians, (who shall be members of the order, if possible) to be selected by the subordinate council, whose duty it shall be to make a careful examination of the member's condition, report as to the permanency of the disability, and upon their recommendation, and the approval of the supreme medical examiner, the member shall be entitled to one-half the benefit, provided that where the disability is caused by accident, and is patent to the eyes of all, the examination by the board of physicians may be dispensed with, etc.

Another section provides that, upon the receipt of the proper notice of the permanent disability of a member, the supreme recorder shall draw an order on the supreme treasurer in favor of such member for the amount, and forward the same to the treasurer of the subordinate council of which the disabled person is a member. Another section provides that the treasurer of the subordinate council shall deliver the order to the member, and receive from him his relief-fund certificate.

Basing his claim upon these provisions of the articles of incorporation, the constitution, by-laws, and relief-fund laws, appellee charges in his complaint that the supreme council instituted and established [a subordinate council] in the State of Kentucky, known as Logan Council No. 12, of which he was and is a member, holding a relief-fund certificate for \$3,000; that in May, 1883, without any agency, fault, or negligence on his part, he received a pistol-shot wound in the elbow, which permanently disabled him from following his usual or other occupation, and that his disability was and is patent to the eyes of all. He, however, through the Logan Council, notified the supreme council, and it in turn notified the Logan Council to appoint a board of physicians to examine the injury. The board was appointed, and reported in favor of allowing and

paying to appellee \$1,500, the one-half of the amount named in his relief-fund certificate. Appellant has refused, and still refuses to pay the amount.

Appellant answered this complaint in four paragraphs, the first of which is a general denial. The second is based upon the theory that, as there was no grand council in the State of Kentucky, Logan Council No. 12 was under the immediate jurisdiction of the supreme council; that the provisions of the articles of incorporation, the constitution, by-laws, and relief-fund laws of the supreme council, above referred to and set out, were intended to and do afford the members of the order an adequate tribunal within the order for the settlement of such controversies. It alleges that the report of the board of physicians was referred to the supreme medical examiner, who decided against allowing appellee's claim; that he might have appealed from this adverse decision to the supreme council, but did not do so, and that therefore he cannot prosecute this action. In short, the theory of the plea is that he did not first exhaust the remedies provided within the order, and cannot, therefore, have recourse to a court of law. The third paragraph of the answer charges that appellee should not recover in this action for the reason among others, that he "became engaged in an affray with a party or parties whose names are unknown to the defendant, during which (he) the plaintiff, received a pistol-shot wound in the right arm, said wound being inflicted willfully and intentionally by said third party or parties, and that the same was not therefore accidental. It is further charged that appellee was not thereby permanently disabled from following his usual occupation. There are many other averments in this paragraph, but the above are the real questions presented thereby. The fourth paragraph is based upon the theory that under the provisions of the articles of incorporation, etc., above referred to and set out, the supreme council is made the arbiter and court of appeals for the final settlement of all controversies between the order and the members. It is alleged that appellee called for the appointment of a board of physicians; that they were appointed and reported in favor of his claim; that this report was referred to the supreme medical examiner; that the supreme medical examiner decided against the claim, and reported his decision to the supreme council; and that upon the receipt of such report the supreme council refused to allow appellee's claim.

The second and fourth answers present these questions: First. Do the constitution, by-laws, and relief-fund laws provide a tribunal

within the order, to which a member may appeal in a case like this?

Second. If there is such a tribunal, and a mode of appeal thereto provided, must a member in a case like this take such an appeal and exhaust his remedies in such courts of the order before resorting to a court of law to enforce his rights?

Third. If the supreme council, as such appellate court, passed upon such a claim adversely, is the decision so final and conclusive that the member may not resort to a court of law? All of these questions were exhaustively examined and ruled in the negative in the case of *Bauer vs. Sampson Lodge K. of P.*, 102 Ind., 262. The by-laws and regulations involved in that case more clearly define the tribunals within the order and the mode of appeal thereto, than do the by-laws, etc., involved in the case before us. Here, when a matter has been referred to the board of physicians, and they have passed upon it, their report goes to the supreme medical examiner for his examination and decision. He is to report his official acts to the supreme council. So far as we can discover, there is no mode provided in the by-laws or otherwise, by which a member, in a case like this, can appeal from the decision of the supreme medical examiner, or invoke the decision of the supreme council in approval or disapproval of the decisions of that officer. However that may be, it is very clear that the provisions are not such as to make it obligatory upon the member in a case like this, to first invoke a decision of the supreme council before resorting to a court of law to enforce his rights.

It is also clear, under the ruling of the above case of *Bauer vs. Sampson Lodge K. of P.*, that the order could not, by provisions in its constitution, by-laws, or relief-fund laws, deprive a member of the right to resort to a court of law to enforce his rights in a case like this. The reasons upon which the rulings in that case are made to rest, are so fully stated with a citation of the authorities, that we need not restate them here. We therefore content ourselves with a citation of the case. As we have seen, the relief-fund laws provide for the payment to the member of one-half of the amount named in the relief-fund certificate held by him when he has become disabled by accident. It is charged in the complaint, as we have also seen, that without any agency, fault, or negligence on the part of appellee, he received a pistol-shot wound in the elbow, which permanently disabled him from following his usual or other occupation. The third answer is an attempt to meet and overthrow the case as made by the complaint, by alleging that appellee became

engaged in an affray, and that the pistol-shot wound was intentionally inflicted by the adversary or adversaries.

The argument is that the injury, having been intentionally inflicted in an affray, was not an accident, and that hence appellee cannot recover.

Our statute provides that if two or more persons, by agreement fight in any public place, the persons so offending are guilty of an affray: Rev. Stat., 1881, §1,980.

To be engaged in an affray under this statute, both parties will be guilty of a violation of the law because the fighting must be by agreement. We have no knowledge, however, that such a statute is in force in Kentucky, where appellee received the wound, and where it is alleged in the answer he received it. We cannot, therefore, give to the word "affray" as used in the general charge in the answer, a meaning broader than the usual and ordinary signification of the word. Ordinarily, an affray means simply the fighting of two or more persons in some public place, to the terror of others. Mr. Roscoe, in his work on Criminal Evidence, page 270, says:—

It differs from a riot in not being premeditated. Thus if a number of persons meet together at a fair or market, or upon any other lawful or innocent occasion, and happen on a sudden quarrel to engage in fighting, they are not guilty of a riot, but of an affray only (of which none are guilty but those who actually engage in it), because the design of their meeting was innocent and lawful, and the breach of the peace happened without any previous intention:

It will thus be seen that the common-law definition of an affray does not involve an agreement to fight, as does our statute. We must presume that the common law is in force in Kentucky. It might be, therefore, that appellee was engaged in an affray in Kentucky without having agreed to fight and without any culpable fault on his part. The charge that appellee was engaged in an affray is, moreover, the statement of a conclusion, and is not sufficient to meet the averments in the complaint that appellee received the wound without any agency, fault, or negligence on his part.

If the facts were stated instead of the conclusion, as the rules of pleading required, it might appear that the only part of appellee took was in defense of his person against the assaults of his adversary or adversaries; and that thus, whatever injuries he received were received without any fault or wrong on his part.

Now, will it do to say that because the injury was intentionally

inflicted by the assailant and wrong-doer, it was not an accident to appellee, within the meaning of the word "accident" as used in the relief-fund laws, etc., of the order. To thus limit the word "accident" would be to thwart the manifest object of the order, and deprive the members of the benefits they have a right to expect upon the payment of their dues and assessments. The word "accident" as used in those laws and in the relief-fund certificates held by the members, should be given its ordinary and usual signification, as being an event that takes place without one's foresight or expectation. It will not do to say that because a desperado way-lays, assails, and wounds a member intentionally, that wounding is not an accident to the member within the laws, etc., of the order.

It follows from what we have said that the court below at general term did not err in reversing the decision at special term, and in remanding the cause to the special term, with directions to sustain appellee's demurrer to the second, third, and fourth paragraphs of appellant's answer.

The judgment at general term is affirmed, at appellant's costs.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BURNHAM

vs.

BOSTON MARINE INS. CO.*)

Statements made by an insurance agent before issuing a policy cannot be used to change the contract of insurance finally made as contained in the policy.

Under a marine policy "free from claim for particular and general average," the plaintiff must show either an actual total loss of the property insured, or a constructive total loss followed by an abandonment.

Contract upon a policy of insurance, issued by the defendant "on advances, on board the schooner *Madame Roland*, free from claim for particular and (or) general average." The words "and — dollars on the outfits, catch, cargo, or the freight on the cargo," printed in the policy, were stricken out. The policy in suit was shown to have been issued to the plaintiffs by George Steele, of Gloucester, Mass., whose name appears upon it, as agent. It was admitted that Steele was the local agent of the defendant at Gloucester, having authority to take risks and countersign and issue policies, which were furnished him by the defendant, signed by the president and secretary. It appeared that Steele was also president of the Gloucester Mutual Fishing Insurance Company, of Gloucester. At the trial in the superior court, the plaintiffs testified that the policy in suit was issued by him under the following circumstances: The plaintiffs are owners of the fishing schooner *Madame Roland*, which vessel they had recently bought of said Steele, who

* Decision rendered, June 20, 1885.—From *Eastern Reporter*.

was largely engaged in the fishing business in Gloucester. They had insured their vessel and her outfits in the Gloucester company, and they testified that they had, as they supposed, all the insurance they could have on the vessel and on the outfits of the company. Some time after this policy was issued, Steele came to the plaintiffs' place of business in Gloucester, told them that they were not sufficiently covered on that vessel, and ought to have more in case of total loss; that he could write \$500 in Boston Marine for them; they asked him how he was going to write it, and he said: "I shall not call it outfits, I shall call it advances; and it will be all right." He then showed them a list of parties in Gloucester, for whom he had written policies in that way. After some talk they agreed that he should do it, and after a few days he sent them the policy sued on. All the evidence as to conversations between Steele and the plaintiffs was introduced against the objection of defendant.

The plaintiffs also called one Gore, who testified that the word "advances" had not a fixed and definite meaning of itself in the business of insurance, but that its meaning depended upon the circumstances under which it was used; that under the circumstances of this case the word "advances" might apply to any pecuniary interest in anything put on board the vessel; that he had examined the list of articles which were put on board this schooner, and that everything on those lists might properly be insured as advances. On cross-examination he testified that "outfits" would be a better word than "advances," to describe the articles on board the schooner; that he could see no reason for striking out the printed word "outfits" in the policy and writing in "advances on board," if outfits were to be insured thereunder; that "advances" meant usually "advances to crew" or "advances on account of freight," and that it had been used in one of these meanings in the larger portion of those policies in which he had known it to be used. The defendant objected to the admission of this evidence.

The defendant requested the court to rule upon all the evidence in the case that the plaintiffs could not recover in this action. The court refused so to rule, but ruled that the plaintiffs could not recover under this policy for loss of outfits, but that they might recover under the policy the amount of advances to crew (\$60.14), and the amount furnished to captain to buy bait (\$100), and that there was evidence to justify the jury in finding a total loss. To those rulings both the plaintiffs and defendant excepted. A verdict was taken for the plaintiffs by consent for \$160.14 and interest, and

the case was reported for the consideration of the supreme judicial court.

G. B. IVES & B. N. JOHNSON, *for Plaintiffs.*

J. C. DODGE & SONS, *for Defendant.*

FIELD, J.

The statement made by Steele, before the policy was issued, that he could "write \$500 more in the Boston Marine Insurance Company and could call it advances and not outfits, and that it would be all right," could not be received to change the contract actually made.

The testimony of Gore is that "advances" in policies of insurance commonly meant advances to the crew and advances on account of freight. The only portion of his testimony favorable to the claim of the plaintiffs is an expression of an opinion of what might properly be done, and not testimony of anything that had actually been done, or any existing usage.

The advances claimed are \$60.14, which had been advanced to different members of the crew, to be repaid by them out of their shares of the catch, and \$100 which had been advanced to the captain to buy bait. Neither the captain nor the crew received wages, "but took shares of the catch instead." It is not contended that the advances to the crew were not covered by the policy, if the evidence showed a total loss. For the advances to the crew, the plaintiffs had a lien upon their share of the catch. The plaintiffs also had a lien upon the catch for any money expended for bait. If the plaintiffs delivered money to the captain to be expended for bait, and he did so expend it, it would seem that the captain became personally indebted to the plaintiffs for it, and that the plaintiffs would have have no lien on the catch for the payment of this debt; and that it would not be covered by the policy: *Minturn vs. Warren Ins. Co.*, 2 Allen. 86.

So far, however, as the money was expended for bait, it was an advance on account of the catch, for the payment of which the plaintiffs held a lien on the catch, and was covered by the policy. There was evidence from which the jury could properly find that \$90 had been expended for bait.

The defendant denies that there was a total loss of the catch, out of which the advances were payable. The policy was "free from claim for particular and general average," and the plaintiffs must show either an actual total loss of the catch or a constructive total

loss followed by an abandonment: *Heebner vs. Eagle Ins. Co.*, 10 Gray, 131; *Greene vs. Pacific Mut. Ins. Co.*, 9 Allen, 217.

We think there was sufficient evidence of a constructive total loss of the schooner, outfits, and catch, and of an abandonment to Steele and of an acceptance of it by him. The Gloucester Mutual Fishing Insurance Company, of which Steele was president, had insured the schooner and "outfits, catch, cargo, or the freight on said cargo." Steele was also "the local agent of the defendant at Gloucester, having authority to take risks and countersign and issue policies, which were furnished him by the defendant, signed by its president and secretary." The defendant's policy is "on advances on board the schooner *Madame Roland*." A constructive total loss of the catch would be a constructive total loss of the advances, which were a lien on the catch. At the same time that the plaintiffs delivered to Steele written notice that they abandoned the schooner *Madame Roland* to the Gloucester company, they also delivered to him, as agent of the defendant company, written notice that they abandoned the schooner to the defendant as insured under the policy, the number of which they gave. Plaintiffs had previously orally abandoned the vessel to Steele, who had sent a man to take charge of her.

We think it is too narrow a construction of this notice to the defendant, to hold that it was merely an abandonment of the schooner. The notice refers to the policy and reasonably gives notice that the plaintiffs abandoned whatever was on board the schooner, to which the policy attached: *Macy vs. Whaling Ins. Co.*, 9 Metc., 354. If the defendant insists upon a new trial, in order to determine what part of the \$100 was actually expended for bait, the exceptions must be sustained and a new trial granted upon damages only; otherwise, if the plaintiffs will remit from the verdict \$10 with interest thereon from the date of the writ, there may be

Judgment on the verdict.

SUPREME COURT OF MINNESOTA.

Appeal from an Order of the District Court, Ramsey County.

BROADWATER ET AL., COPARTNERS, ETC.,

VS.

LION FIRE INS. CO.*

The property was described as "buildings adjoining and communicating, occupied * * situated detached."

Held, That the meaning was that the buildings were detached from others, not from each other.

The agent to procure insurance is not an agent for purpose of cancellation.

The buildings stood on land of the United States, and were described in a printed slip attached to the policy by the agent, and forming part of it as "their buildings" occupied as store, office, club, etc., at Fort McGinnis, with other words indicating their character as being used by a post trader.

Held, That the company was bound to know that a post trader at a military post could not own the land, and a provision making the policy void if the title to the land was not in the insured is repugnant and void.

HARVEY OFFICER, *for Respondents.*

C. D. O'BRIEN, *for Appellant.*

BERRY, J.

This is an action upon a fire policy, in which the defendant interposes the three following defenses: (1) That the policy was obtained by fraud; (2) that the title to the insured property was not in the insured, and so the policy was void by its own terms; (3) that the premium was never paid, and that the policy was canceled before loss.

Opinion filed, February 2, 1886.

We have carefully perused all the testimony in the case, oral and documentary, and, after duly considering the briefs and argument of defendant's counsel, are of opinion that the findings of the trial court against the first and third defenses are sufficiently sustained by the evidence. Without here attempting the unnecessary task of considering the evidence in detail, we shall only add two suggestions: (1) That the fair construction of the property description found in the policy, to wit, "buildings adjoining and communicating, occupied, * * * situated detached, * * *" is not that the buildings were "detached" from each other, but that as a whole or mass they were "detached" from other buildings. (2) An agency to procure insurance is not, as a matter of law, presumed to continue for the purpose of canceling an insurance procured, or of receiving notice of such cancellation: *Grace vs. American Cent. Ins. Co.*, 109 U. S., 278; s. c. 3 Sup. Ct. Rep., 207; *Adams vs. Manufacturers' & B. F. Ins. Co.*, 17 Fed. Rep., 630. And in this case there is no ground for an inference of fact that Miller was plaintiffs' agent for the purpose of canceling the policy in suit, or of receiving notice of such cancellation.

This brings us to consider the second defense. The policy contains the following provision: "This policy shall become void, unless consent in writing is indorsed by the company hereon, in each of the following instances, viz.: * * * If any building intended to be insured stand on ground not owned in fee-simple by the assured." The buildings insured in this instance in fact stood upon land of the United States. The finding of the trial court is "that, at the time of the application for said insurance, and ever since, until the loss, * * * the * * * buildings and property in said policy described were situated upon land which was not owned by the plaintiffs, but was owned by the government of the United States; that the said buildings were then and there occupied and used by said C. J. McNamara (one of plaintiffs' firm), who was then and there, and ever since has been, the post-trader at the said Fort Maginnis mentioned in said policy, and that all of said facts relative to the ownership of said land, and the use and occupation of said buildings, were well known to and understood by said defendant prior to and at the date of said policy, and the issuance and delivery thereof to the plaintiff." There appears to have been no formal written application for the insurance in controversy, but what is ordinarily spoken of as the written part of a policy, containing the description of the insured property, was in this instance upon a printed slip, signed by defend-

ant's agents, and attached to the policy so as to form a part of it. This slip, so far as here important, is as follows: "The Lion Fire Insurance Company, * * * in consideration of sixty dollars, * * * does insure Messrs. Broadwater, McNamara & Co., to the amount of \$3,000; * * * \$960 on their one-story, frame, shingle-roofed buildings adjoining and communicating, * * * occupied as a store, warehouse, officers and soldiers' club, sleeping-rooms, and room for opening goods, * * * at Fort Maginnis, Meagher County, M. T.; and \$120 on store and office furniture and fixtures * * * while contained in that part of said building occupied as a store and offices; and \$60 on billiard tables * * * in that part of said building occupied as officers' club-room; * * * and \$1,320 on general merchandise * * * contained in said building, * * * exclusive of that part * * * occupied as warehouse and soldiers' club; and \$480 on general merchandise * * * while contained in that part of said building occupied as a warehouse and soldiers' club." In our judgment, this description of the property insured was enough to inform the defendant and its agents by whom the slip was signed and the policy issued, that the buildings insured (which were admittedly plaintiffs' property), were situated at a United States military post or fort, and that they were used and occupied by a post-trader, in the business of a post-trader at that place.

If the description did not so in fact inform the defendant's agents, it was not the fault of plaintiffs. It was amply sufficient notice of the facts. "At Fort Maginnis" does not mean in the neighborhood of, but upon the site of the fort, or upon the grounds or reservation connected with and forming part of the military post at that place, and within the jurisdiction of the military authorities there stationed. Then, to go one step further, the facts that there is no private ownership of land at such posts, (especially when situated in remote parts of the country), and no private trading allowed there, and the facts as to the position of a post-trader are, to such an extent, of a public character, and so generally known, or if not in fact known in a particular instance, so readily suggestive by a moment's reflection, that the plaintiffs had the right to assume that the description on the printed slip would sufficiently inform the defendant and its agents that the plaintiff did not and could not, in any ordinary course of things, own the land on which the buildings insured were situated. In view of these considerations, we are of opinion that the finding of the court above cited, as to the defendant's knowledge of the

fact that plaintiffs did not own the land on which the building stood, is supported by the evidence.

It follows that the description contained in the slip is in effect the same as if it had been expressly stated therein that the ground upon which the insured buildings were situated was not the property of plaintiff, but of the United States; and if this is so, the defendant having insured the buildings upon the basis that they stood on ground not owned by plaintiffs, the subsequent provision heretofore quoted,—viz., that if the title to the ground was not in plaintiffs, the policy should become void unless consent in writing was indorsed on the policy by the company,—may be treated either as repugnant to the contract in fact made, and of no effect, or as controlled by the description in the slip. For all purposes of construction the printed slip is to be regarded as what is ordinarily known as the written part of the policy, which, as more immediately expressive of the intention of the parties, is by a familiar rule allowed a controlling force in case of repugnancy between it and stipulations which, as applicable to policies in general, are found in what may be termed the printed blank or form: *Phoenix Ins. Co. vs. Taylor*, 5 Minn., 492 (Gil. 393); *Wood, Fire Ins.* §§ 63–67, and cases cited; *Harper vs. Albany M. Ins. Co.*, 17 N. Y., 194.

If there were any doubt as to the correctness of this our conclusion, we should be much inclined to hold that the evidence of waiver on defendant's part of the want of title in plaintiffs is so strong, resting, as it appears to do, upon admissions in defendant's answer, and in documents whose authenticity and authority is unquestioned, as to warrant us in denying a new trial, which would in all probability lead to the same result as that which has already taken place.

The order denying a new trial is affirmed.

SUPREME COURT OF PENNSYLVANIA.

Error to the Court of Common Pleas of Schuylkill County.

PARCELL

vs.

GROSSER.*

1. Plaintiff agreed in writing to sell realty to defendant, the latter paying part of the purchase money and going into possession. Afterwards, the balance not having been paid as provided, the plaintiff brought ejectment.

Defendant set up a contemporaneous parol contract that the plaintiff should retain a certain existing policy of fire insurance of the premises in his favor as security for the unpaid purchase money, the defendant paying the assessment thereon and the insurance to be for his benefit; that the building was destroyed by fire, and that the neglect of the plaintiff caused the loss of the insurance money, which was sufficient to cover the said unpaid purchase money.

Held, That this was a competent defense to the ejectment; that the proposed evidence did not impinge on the rule against the admission of parol to vary writing; and that it was the duty of plaintiff to take the proper steps to collect the insurance money.

2. A policy of fire insurance is not avoided by a contract of sale of the insured property; until a conveyance is executed the vendor retains an interest sufficient to sustain an action on the policy in case of loss.

3. As between him and the vendee, the vendor holds the insurance money as trustee for the vendee.

JAMES RYON and DAVID A. JONES, Esqs., for Plaintiff in Error.

J. W. RYON and W. A. MARR, Esqs., for Defendant in Error.

STERRETT, J.

If it were not for the alleged parol agreement in relation to insurance on buildings effected by plaintiff prior to the contract of sale, he would undoubtedly have been entitled to a verdict for the premises

* Decision rendered, October 5, 1885.—From *Legal Intelligencer*.

described in the writ, to be released on payment of the residue of purchase money, \$1,200 and interest, within such time as the jury might have considered reasonable. As to the terms of the written contract of March 30th, 1872, there is of course no dispute. Plaintiff covenanted therein to sell and convey the premises in controversy to defendant on or before March, 29, 1874, and in consideration thereof the latter agreed to pay \$2,000, \$1,000 in hand and the residue in two equal annual payments with interest, with the privilege of paying the whole \$1,200 within one year or less from that date. It is further provided that payment of the purchase money is a condition precedent to the execution of the deed or deeds of conveyance by plaintiff.

It is conceded the hand money was duly paid, but neither of the deferred installments has ever been actually paid by the defendant. His contention is, that in equity, as between himself and plaintiff, they have been paid and satisfied ; that if plaintiff had acted in good faith in regard to the insurance policy he would have received the insurance money for the buildings which were destroyed by fire before the first deferred payment matured ; that as the result of his bad faith and gross negligence, insurance money equal to the unpaid installments, and which should have been collected and applied in satisfaction thereof, was wholly lost.

Shortly before the contract of sale, plaintiff had effected an insurance on the buildings for \$1,500, and testimony was received, under exception, tending to prove that it was verbally agreed between the parties that he should continue to hold the policy as collateral security for the unpaid purchase money, etc. ; that in pursuance of a mutual understanding that the arrangement was partly at least for the benefit of defendant, he, at plaintiff's request, shortly before the fire, paid the only assessment that was made on the policy after the contract of sale ; that on the day after the fire, plaintiff, in response to notice from defendant, visited the premises, and by his acts and declarations assured him that he would attend to collecting and properly applying the insurance money. The testimony tending to prove these and other corroborating facts and circumstances, was fairly submitted to the jury with proper instructions, under which they rendered a verdict for defendant. In so doing, they must have found the facts in relation to the insurance as claimed by defendant. It was therefore the duty of plaintiff to have taken the proper steps to collect the insurance money. It is contended, however, on his behalf, that, assuming the facts to be as the jury must have found them, no

such duty rested on him; and, moreover, that by the contract of sale, the policy, not being transferred, became void. There is nothing in the facts of the case or the law applicable thereto, that warrants either of these conclusions. The effect of a mere contract of sale on the relative rights of the parties thereto and their interest in existing policies of insurance, was considered in *Perry County Insurance Co. vs. Stewart*, 7 Harris, 45; *Insurance Co. vs. Updergraff*, 9 Harris, 513; *Reed vs. Lukens*, 8 Wright, 200; *Hill vs. Cumb. Valley M. P. Co.*, 9 P. F. Smith, 474, and cases therein referred to. In the case first above cited it is said: "Where one has entered into an agreement for the sale of his insured property, but has not made a conveyance thereof, nor received the purchase money, his interest in the property and policy is not thereby parted with, so as to bar his right of action on the happening of a loss." It is also held in *Reed vs. Lukens*, *supra*, that "the money due on a policy of insurance for a loss by fire, occurring between the date of such contract and the time fixed for delivery of deed, as between the company and the vendor by whom it was insured, belongs to the latter, but as he is a trustee for the vendee, he must account in equity to his cestui que trust for the insurance money." The same principle is more fully elaborated in *Hill vs. Cumberland Valley M. P. Co.*, *supra*. This case is also authority on the point that the policy was not avoided by the contract of sale. There has been something said about the company having canceled the policy, but we fail to see anything in that position. They had no right to cancel it without returning a ratable proportion of the premium to the assured for the unexpired time, which was not done.

The conclusion of the jury was warranted by the law and the facts found by them. The only question as to which we had any doubt is, whether the admission of evidence to prove the parol agreement as to the insurance policy impinged on the well-known rule against the admission of parol testimony to vary the terms of a written contract. We are not satisfied it did. Moreover, the agreement in relation to the insurance was collateral to and not an essential or necessary part of the contract of sale. It practically constituted a separate and distinct agreement, which was afterwards recognized by the parties, and acted upon when plaintiff called on defendant to pay the insurance assessment. The evidence as to their understanding in regard to the policy of insurance was full, clear, and explicit, supported by four witnesses, one of whom was plaintiff himself. The case was well tried, and the result reached by the verdict was just and equitable. There

is nothing in the case to indicate that the plaintiff, in the exercise of reasonable diligence, would not have received the insurance money, or, at least, enough thereof to satisfy the deferred payment. It was his duty to do so. Instead of performing that duty, he acted in bad faith, misled the defendant, and the result was the insurance money was lost. The jury came to the conclusion that plaintiff should bear the loss, and in that we think they were right.

Judgment affirmed.

UNITED STATES CIRCUIT COURT.

WESTERN DISTRICT OF NORTH CAROLINA.

FALLS OF NEUSE MFG. CO. AND OTHERS

vs.

GEORGIA HOME INS. CO.*

Where several actions removed from a State court are based upon insurance policies on the same property, upon the same application, issued at the same time, and by the same agent, containing a clause for contribution, the court will order one of the causes to be transferred to the equity docket, and the other defendants to be made parties, and the pleadings in that case to be reformed according to the equity practice.

In such case the plaintiff will be enjoined from further proceedings in the other actions until a final decree in the cause so transferred.

In such case an action against a resident defendant company, pending in the State court will be stayed until such final decree, and such company will be made a party to the suit so transferred.

Motion to consolidate and transfer to the equity docket.

The plaintiffs instituted an action against the defendant for the recovery of \$5,000 upon an insurance policy in the State court. They at the same time and in the same court instituted separate actions against eight other insurance companies, one of which was incorporated in North Carolina, upon policies issued at the same time, upon the same property, and upon the same application. All the policies contained the following stipulation :—

“In case of any other insurance on the property herein insured, whether valid or not, or made prior or subsequent to the date of this policy, the assured shall be entitled to recover of the company no greater proportion of the loss sustained than the sum hereby in-

* Decision rendered, October 15, 1886.

sured bears to the whole amount so insured thereon; and it is hereby declared and agreed that in case of the assured holding any other policy in this or any other company on the property insured, subject to conditions of average, the policy shall be subject to average in like manner."

The non-resident insurance companies removed the actions against them respectively to the United States Circuit Court, under the act of Congress of 1875.

At October term, 1885, of the court, the defendants in the action removed, being liable each for a proportionate part of the loss (if liable at all), insisted that as each company was liable to contribute only its proportionate amount of the loss, there should be a single ascertainment of the loss incurred, so as to bind all of the companies, and that each company should be held (if at all) for the proportion of that sum which the amount insured by it bore to the total amount of insurance, and that as there could be no consolidation of the suits, except in a court of equity, and as the element of contribution was one of equitable jurisdiction, and that as the cases were removed from a court which, under the new code of civil procedure law and equity were merged, and the distinctions between legal and equitable remedies abolished. In order to completely determine the rights of the parties and to prevent circuitry of action, the several causes should be transferred to the equity side of the docket and consolidated.

WATSON & GLENN, and J. C. BUXTON & FULLER & SNOW, *for Plaintiffs.*

W. W. CRUMP, GRAHAM and RUFFIN, SCHENCK and PRICE, and JOHN W. HINSDALE, *for the Insurance Companies.*

BOND, circuit judge (DICK, D. J., concurring), made the following order:—

This cause coming on to be considered, upon the motion of the several defendants that this cause be transferred and put upon the equity docket of this court, this court doth now declare that the said several insurance companies, to wit.: the Georgia Home Insurance Company, the Virginia Fire and Marine Insurance Company, the Westchester Fire Insurance Company, the Imperial Fire Insurance Company, the Virginia Home Insurance Company, the Rochester-German Insurance Company, and the North Carolina Home Insurance Company, are necessary and indisputable parties to the cause in order that the rights of all the parties may be duly ascertained and administered, and that the same can only be done by a court of

equity. It is thereupon ordered and decreed that this cause be transferred and put upon the equity docket of this court for trial, and that the pleadings of parties in said cause be reformed according to the equity practice of this court.

And it thus appearing to the court that the North Carolina Home Insurance Company is a necessary and indisputable party to this cause, it is further ordered and decreed that the plaintiffs proceed according to the course of this court to make the said North Carolina Home Insurance Company and the other insurance companies parties to the suit transferred.

And it is further ordered that the plaintiffs be enjoined from further proceeding in any action or cause now pending in this court against any of the defendants first above enumerated until there shall be a final decree rendered in the cause hereby directed to be framed and put upon the equity docket of this court.

And it further appearing to the court by the admission of all parties in open court that the plaintiffs have a suit against the North Carolina Home Insurance Company, touching the same subject-matter, now pending in the superior court of Surry County in the State of North Carolina, it is further ordered and decreed in pursuance of the court's intention that the rights of all the parties in interest may be equally and fully administered that the said plaintiffs be enjoined, and they are hereby enjoined from further proceeding in said cause until said final decree may be rendered in this court, sitting as a court of equity, and in the mean time that this cause, together with the other causes now pending in this court between the said plaintiffs and any of the said insurance companies, remain and be upon the law docket of this court until the further order of this court, and on motion of counsel for each and every one of said insurance companies they are allowed to be made, and are hereby made parties defendant to this cause as transferred.

SUPREME COURT OF MINNESOTA.

BORIGHT

vs.

SPRINGFIELD F. & M. INS. CO.*

The insurance was against fire on horses and colts while in barn, "and by lightning only while in use, or running in pasture, or yard on his farm, in the town of Le Sueur."

Held, That the insurance against lighting was not restricted to the farm, but was co-extensive with the town.

Held, That punctuation is a very fallible standard of interpretation, and will not be allowed to overrule a meaning ascertained from other sources, and the nature and uses of the property will be considered in the construction as to a loss within the risk.

Held, That a former policy on the same risk is not evidence as to an alleged fraudulent change of punctuation.

CADWELL & PARKER, *for Plaintiff*.

BERRY & MOREY, *for Defendant*.

MITCHELL, J.

Action on a policy of insurance to recover the value of a colt alleged to have been killed by lightning. The policy was issued December, 1883. At that time plaintiff owned and occupied a farm in the town of Le Sueur. In 1884 he leased a pasture in the same town, but distant some two miles from the farm referred to. The colt was killed in July, 1884, while in this pasture. The here material part of the policy is that the defendant insured the plaintiff against damage or loss by fire, to the amount of \$500, "on his horses and colts while in barn, and by lightning only while in use, or

* Opinion filed, December 12, 1885.

running in pasture, or yard on his farm, in the town of Le Sueur, Minn."

Aside from that of the cause of the death of the colt, the principal issue of fact upon the trial was whether this policy had been, as contended by defendant, altered after its execution by inserting commas after the word "pasture" and "farm," respectively. It may admit of serious doubt whether the presence of these commas would in any way affect the meaning of the policy. It has been well said that punctuation is a most fallible standard by which to interpret a writing. It may be resorted to when all other means fail; but the court will take the instrument by its four corners in order to ascertain its meaning. If that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it: *Ewing vs. Burnet*, 11 Pet., 41.

But be this as it may, the policy with its present punctuation is fairly and reasonably susceptible of the construction claimed for it by plaintiff, to wit, that it covered the horses and colts while in use, or while at pasture, anywhere in the town of Le Sueur; and that the risk was not limited to the farm of plaintiff; and, even if it was equally susceptible of another meaning, it should be construed most strictly against the insurer. In determining whether a loss is within the policy, so far as location is concerned, the nature of the property and the uses to which it is devoted may be considered in construing the language used in order to ascertain the meaning of the parties, unless the location is specifically defined: *Wood, Ins.* 109. This was not inanimate property, like household goods, having a fixed location, but animals designed for domestic use on the farms and elsewhere, as occasion required. The place of use, as well as the place of keeping them, would necessarily change from time to time,—a fact which the parties must be presumed to have understood. If the risk when the animals were at pasture is to be limited to this farm, the risk while they were in use must be limited to the same location; for, as the policy reads, we see no room for any distinction. Had the insurer intended to limit the risk to the farm then owned by plaintiff, it could, and naturally would, have used more explicit and unambiguous language.

2. The policy, also the record of it kept by defendant's agent, and the report of it sent by him to the company, were all introduced in evidence by defendant without objection, and examined and compared upon the issue as to the alleged alteration. The defendant then offered a former policy issued to plaintiff by defendant, through

the same agent, on the same class of property, and against the same class of risks, but for a smaller amount; also the agent's record and report of it. These were offered for the purpose of showing that they contained no such commas. The inference sought to be drawn from this fact was that the policy in suit, as issued, did not contain these commas; and this inference was based upon the assumption that the agent punctuated both policies alike. In our judgment, the evidence was inadmissible; the record and report for the manifest reason that they were the mere statements of defendant's agents, and the policy for the reason that there is no presumption that the second policy was worded or punctuated the same as the first. There was no evidence that the second was copied from the first, or that there was any agreement of the parties to that effect. The second policy was in no proper sense a renewal of the first, although the first was surrendered and canceled when the second was issued. It was in itself a new, complete, and independent contract. Whatever moral force there may be in the suggestion that the agent would probably write and punctuate the second policy the same as the first, it certainly has no legal, probative weight whatever.

The only other point made is that the findings are not sustained by the evidence. Inasmuch as the record, neither in the body of the case nor in the judge's certificate, purports to contain all the evidence, the question cannot, under the repeated rulings of this court, be considered: *Henry vs. Hinman*, 21 Minn., 378; *Koethe vs. O'Brien*, 32 Minn., 78; s. c. 19 N. W. Rep., 388; *Craver vs. Christian*, 32 Minn., 525; s. c. 21 N. W. Rep., 716. And even if the record purported to contain all the evidence, although the testimony as to the cause of the death of the colt is quite scant, yet we hardly think we would be justified in saying that there was not enough to sustain the finding.

Order affirmed.

SUPREME COURT OF PENNSYLVANIA.

Error to the Court of Common Pleas of Cambria County.

KITTANNING INS. CO. }

vs. }

O'NEILL.* }

In an action upon a policy of insurance, to recover damages for loss by fire, the preliminary proofs may be admitted in evidence solely for the purpose of showing the performance of a condition precedent to the right of action.

Being in writing, the question of their sufficiency for that purpose is to be decided by the court.

It is error to permit such papers to be sent out with the jury to be examined by them in their deliberations.

Covenant by John P. O'Neill against the Kittanning Insurance Company upon a policy of insurance whereby defendant insured the goods of plaintiff against loss or damage by fire.

A loss having occurred, plaintiff presented to the company written proofs, reciting the terms of the policy and the description and value of the property destroyed, which were verified by affidavits. The company demanded an appraisement, and in pursuance thereof, the assured selected one appraiser and the company one, who subsequently met but failed to agree upon the value of the property and adjourned.

Before they held another meeting O'Neill brought this suit, and upon the trial before Johnson, P. J., plaintiff offered these proofs in evidence, to show that the condition of the policy which requires

* Opinion filed, November 2, 1885.—From *Pittsburgh Legal Journal*.

the assured to furnish such statement within a specified time after the fire, had been complied with, as a condition precedent to the right of action. At the close of the trial plaintiff's counsel proposed to send these proofs of loss out with the jury. Defendant's counsel objected, but the objection was overruled. The jury having found in favor of plaintiff, and judgment having been entered thereon, defendant took this writ.

MESSE^{RS}. H. W. WEIR and WM. H. SECHLER, for *Plaintiffs in Error*, cited—

Ins. Co. vs. Sennett, 41 Pa. St., 161; Ins. vs. Schreffler, 42 id., 188; Same vs. Same, 44 id., 269; Same vs. Lawrence, 4 Metc., 9; Farrell vs. Ins. Co., 7 Baxter, 542; Ins. Co. vs. Ruben, 79 Ill., 402; Brown vs. Ins. Co., 68 Missouri, 133; Baily vs. Ins. Co., 73 id., 371; Elgerly vs. Ins. Co., 48 Iowa, 644.

JOHN P. LINTON, Esq., *Contra*.

"A jury may take out with them any writings that have been given in evidence without distinction as to sealed or unsealed, except the deposition of witnesses:" Alexander vs. Jameson, 5 Binney, 238.

In illustration and accordance with this rule it has been held that "records" of court may be sent out: Hendel vs. Berks and Dauphin Turnpike Road, 16 S. & R., 91.

Also information taken before a magistrate: Seibart vs. Price, 5 W. & S., 438.

Patents, title deeds, drafts, and other papers given in evidence at trial: Riddlesburg Coal Co. vs. Rodgers, 15 P. F. Smith, 416.

Letters, checks, due-bills, application for insurance papers, etc.: Udderzook vs. Commonwealth, 26 P. F. Smith, 354.

Claim filed with bill of particulars in mechanics' lien case: Odd Fellows' Hall vs. Masser, 12 Harris, 507.

Sending papers to jury a matter of sound discretion of court, and not subject of error: Spence vs. Spence, 4 Watts, 165; O'Hara vs. Richardson, 10 Wright, 389; Little Schuylkill Navigation Co. vs. Richards, 7 P. F. Smith, 148.

MERCUR, C. J.

The specification of error is to the court sending out with the jury, under exception, the paper containing the proofs of loss, and schedule attached.

It is true, it has been ruled that, in the sound discretion of the court, many papers that have been given in evidence may be sent out with the jury. This paper, however, had not been given in evidence generally. It was admitted solely for the purpose of showing that proofs of loss had been furnished as required by the policy. It was therefore for the purpose of showing a condition precedent to a right of action. Being in writing, the question of sufficiency for that purpose is to be decided by the court: *Commonwealth Insurance Company vs. Sennett et al.*, 5 Wright, 161. They are not even *prima facie* evidence to the jury of the quantity and quality of the goods lost: *id.* The insured cannot thus prove the particulars or extent of his loss by his own *ex parte* statement even under oath. The correctness of this ruling is affirmed in *Lycoming Insurance Company vs. Schreffler*, 6 Wright, 188, nor did the fact that the statement of loss was called for by the company make it evidence for the insured: *id.* Nor is the report of loss made out by the agent of the company, with the affidavit of the insured appended, evidence to go to the jury: *Same vs. Same*, 8 *id.*, 269. The correctness of excluding such evidence from the jury has been recognized in other States: *Phoenix Insurance Company vs. Lawrence et al.*, 4 Metc., 9; *Lafayette, Bloomington, and Mississippi Railroad Co. vs. Winslow et al.*, 66 Ill., 219.

The statement sent out in the present case contains averments exonerating the insured from all improper conduct, and specifies the amount of his loss and damages. It was clearly improper to send such papers out with the jurors to be examined by them in their deliberations. It would be error to permit the insured to give them in evidence to the jury on the trial, and the error was greater in permitting the jury to consider the several averments therein, without their having been given in evidence.

Judgment reversed and *venire facias de novo* awarded.

COURT OF APPEALS OF NEW YORK.

MATTHEW C. UHRIG, *Respondent*,

vs.

WILLIAMSBURGH CITY FIRE INS.
CO., OF BROOKLYN, N. Y., *Appellant*.*

Where there was evidence tending to show that the defendant acted in bad faith in refusing to go on with an arbitration or to secure a speedy appraisal, the question should have been submitted to a jury, whether there was such breach of good faith as relieved the plaintiff from the obligations of the arbitration clause.

If an arbitration fails through the fault of one of the parties, the party not in fault is not obligated to enter into a new arbitration, but may proceed at once to his remedy at law.

ALBERT G. McDONALD, *for Appellant*.PATRICK KEADY, *for Respondent*.

EARL, J.

The plaintiff held a policy of insurance issued by the defendant upon certain personal property, and the property was destroyed by fire in July, 1882. The policy contained this clause: "The amount of sound value and of damages to the property, may be determined by mutual agreement between the company and the assured; or failing to agree the same shall then, at the written request of either party, be ascertained by an appraisal of each article of personal property, or by an estimate in detail of a building, by competent and impartial appraisers, one to be selected by each party, and the two so chosen shall first select an umpire to act with them in case of their disagreement; and if the said appraisers fail to agree, they shall refer the differences to such umpire; and the award of any

* Decision rendered, February 9, 1886.

two, in writing, under oath, shall be binding and conclusive as to the amount of such loss or damages, but shall not decide as to the validity of the contract or any other question except the amount of such loss or damage." Among other things in its answer, the defendant alleged that the plaintiff and defendant failed to agree upon the damage occasioned by the fire, and that on or about the 11th day of August, 1882, it served upon plaintiff a written request that the amount of damages sustained by him from the fire should be ascertained and determined by appraisers to be selected as required by the policy, and offered to select and appoint an appraiser for that purpose on its behalf, and that the plaintiff wholly refused to submit to such appraisal or appoint an appraiser for that purpose, and refused to comply with the terms and conditions of the policy in that respect. Upon the trial it appeared that the fire occurred on Sunday, the 30th of July; that on the next day the plaintiff notified the defendant of the fire and of the loss; that on the 2d day of August it requested an arbitration under the policy, and he assented; that thereupon he selected one De Andreau and the defendant one Magnus as arbitrators, and an agreement in writing was executed by the parties submitting the appraisal of the damages to the arbitrators thus selected, and that the arbitrators failed to agree. The defendant gave evidence tending to show that it subsequently made plaintiff an offer to appoint a new arbitrator in the place of Magnus, and also that Magnus offered to unite with De Andreau in selecting an umpire, but that the plaintiff and De Andreau refused. The plaintiff as a witness in his own behalf, gave evidence tending to show that after the arbitrators failed to agree he requested the defendant to appoint another arbitrator, and that he asked Magnus to agree with De Andreau in appointing an umpire, and they did not accede to his requests.

Under the arbitration clause it was the duty of each party to act in good faith to accomplish the appraisement in the way provided in the policy, and if either party acted in bad faith, so as to defeat the real object of the clause, it absolved the other party from compliance therewith; and if either party refused to go on with the arbitration, or to complete it, or to procure the appointment of an umpire so that there could be an agreement upon an appraisal, the other party was absolved. A claimant under such a policy cannot be tied up forever without his fault and against his will, by an ineffectual arbitration. The evidence tended to show that the defendant failed and refused to go on with that arbitration. In the mean time, partly

under the orders of the city authorities, the offensive debris and broken and injured articles about the plaintiffs' premises had to a great extent been removed, so that an appraisal had become to a large extent impracticable. There was some evidence tending to show, and from which a jury might have inferred that the defendant was not acting in good faith to procure a speedy appraisal, and was interposing this clause in the policy for the purpose of forcing a compromise from the plaintiff. Upon all the evidence, it was a question of fact for the jury to determine whether there was any breach of this clause in the policy on the part of the plaintiff, and the case should thus have been submitted to them.

After its refusal or neglect to go on with the first arbitration which had been agreed upon, on the 10th of August thereafter the defendant served upon the plaintiff another written request to arbitrate, and offered to select a person to appraise the damages on its part. To this offer plaintiff refused to accede, and there was evidence in the conduct of the defendant in reference to the arbitration first agreed upon, and in the removal of the property damaged, tending to show that the refusal was justifiable. The defendant in its answer, did not set up as a bar to the action the pending arbitration, or any conduct of the plaintiff in reference thereto, but simply alleged that the plaintiff upon request refused to enter into an arbitration as provided in the policy. This allegation was untrue. The plaintiff had entered into an arbitration and was not bound to enter into a new one while that was pending, and if that one failed from the fault of the defendant, he had discharged his whole duty under the arbitration clause, and was not bound to enter into a new arbitration agreement. The plaintiff, having once consented to arbitrate, if the arbitration failed and came to an end from the fault of the defendant, the arbitration clause could not stand in the way of this action.

The order should be affirmed and judgment absolute entered against the defendant with costs.

All concur.

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF NORTH CAROLINA.

CONNECTICUT MUT. LIFE INS. CO. }

vs. }

SAMUEL BEAR ET AL.* }

A court of equity will not set aside a contract of life insurance during the life of the assured, on the ground that it has been rendered void by something not appearing on the face of the policy, and which can be proved by extrinsic evidence.

As the assured, who is now intemperate, may reform and live out the ordinary expectation of life, this is not a case for the ordinary exercise of the discretionary power of a court of equity to order a cancellation, even if such power here existed.

READE, BUSBEE, and BUSBEE, *for Complainants.*

RUSSELL and RICAUD, *for Defendants.*

In Equity.

SKYMOUR, J.

This is a bill for the cancellation of a policy of insurance upon the life of the defendant, S. Bear, in favor of the other defendants, and the relief prayed is put upon two grounds : first, an alleged false representation of his habits, with respect to the use of spirituous liquors, made by him in his application ; and, second, an impaired condition of health caused by habitual drunkenness, since the

* Decision rendered, February 4, 1886. — Reported by John W. Hinesdale, Esq., of the Raleigh Bar.

issuance of the policy. The evidence does not prove the alleged fraud which constitutes the first cause of action.

Upon the second, it tends to show that the health of the defendant has been seriously impaired by the use of intoxicating drinks; that if he shall continue in his present course of life it is not probable that he will live to the age of ordinary expectation, and that if he reform nothing that has yet occurred will prevent his attaining to it.

There is some evidence tending to show a recent change in his habits.

The contract of insurance contains a condition, that "if the insured" shall become so far intemperate as to impair his health, "the policy shall become and be null and void." The court is of the opinion, that the insured has become so far intemperate as to impair his health, and the question for determination is whether the plaintiff is entitled to relief in equity.

It cannot be granted on the ground of fraud, for that has not been proved. The action must rest, if supported at all, on the jurisdiction of a court of equity to declare and establish a right.

The question is whether, during the life of the assured, a court of equity will set aside a contract of insurance, on the ground that it has been rendered void by something not appearing on the face of the policy, and which can be proved by extrinsic evidence.

There are many reasons which may be, and some of which have been in this case, urged in support of such action.

The ordinary course of juries in suits against insurance companies, the force with them of the argument that a company having received the premiums during the life of the assured, cannot, in justice, refuse payment after his death, the convenience of trying, while the evidence is easily accessible, the issue of the misconduct of the assured, are inducements which would be very powerful, were I passing upon the question as a legislator. As a judge, I am bound by precedent. No case can be cited in which a policy has been set aside during the life of the assured on the ground of a forfeiture occurring after the making of the contract. In *Ins. Co. vs. Bailey* 13 Wall, 616, a doubt is expressed as to whether it could be done in a case of policy fraudulently obtained. In theory, if not in practice, the legal remedy is complete. The company may avail itself of it when sued.

No division of the powers of courts of equity includes such a source of jurisdiction. A bill of peace can be brought only to avoid

multiplicity of actions. A bill *quia timet*, except in certain cases under State statutes, only by one in possession of land to remove a cloud in his title. This action is of the first impression, falling as I have said under no recognized title of equity.

There is further objection to it. If the court could grant the relief asked, it would come within its discretionary power. Since in a case like this it does not, and in the nature of things cannot, appear that the defendant may not reform and live out the ordinary expectation of life, in the opinion of the court it is not, as a matter of law, a proper case for the exercise of the discretionary power to order a cancellation, even if such power existed.

LOWER COURT DECISION.

EXPENSES.—SEAWORTHINESS.

United States District Court, S. D. N. Y.

CUNNINGHAM AND OTHERS

vs.

SWITZERLAND MARINE INS. CO. AND OTHERS.*

Certain insurance companies, in conjunction with cargo owners, defended against a claim on a bottomry bond. The cargo was finally released from the claim. Afterwards, on suit brought by the cargo owners against the insurance companies, under the "sue and labor" clause in the policies, to recover the expenses of defending the bottomry suits, the company set up the unseaworthiness of the vessel, which they had not utilized as a defense in the previous suits. It appearing that such a defense would not have availed in the former suits, and that in part, at least, at the time of the former litigation the condition of the vessel was unknown to the companies, and that libelants were not misled in any way by the former assistance of the companies, *Held*, that the companies were not estopped in this litigation from using such a defense, nor was there anything in the above facts to prevent an inquiry in this suit into the question of unseaworthiness.

The evidence showing that there were facts tending to indicate unseaworthiness, unless explained, and no explanation being offered, *Held*, that, as the vessel was unseaworthy when she sailed, the policies of insurance never attached, and cargo owners could not recover of the insurance companies the expenses of defending the former suits.

In Admiralty.

WHEELER & SOUTHER, *for Libelants.*

BUTLER, STILLMAN & HUBBARD, *for Respondents.*

BROWN, J.

The above libels were filed by cargo owners to recover the expenses of defending a suit on a bottomry bond, under the "sue and labor" clauses of certain policies of insurance issued by the re-

* Decision rendered, December 31, 1885.—From *Federal Reporter*.

spondents upon the cargo of the *Julia Blake*, from Rio to New York. On the voyage the vessel put in to St. Thomas, where extensive necessary repairs were made, in order to procure which a bottomry bond was given to the Bank of St. Thomas upon her hull and cargo. The vessel, with her cargo uninjured, subsequently arrived in New York. The vessel, freight, and cargo were thereupon libeled for the enforcement of the bottomry bond. Practically no defense in that suit was made as respects the ship and freight. The controversy as regards the cargo was carried to the supreme court. The decisions of this court and of the circuit court were there affirmed, and the cargo released on the ground that no communication was had with the owners of the cargo prior to executing the bottomry bond. The *Julia Blake*, 16 Blatchf., 472; s. c., 107 U. S., 418; s. c., 2 Sup. Ct. Rep., 692.

At first the insurers employed proctors and counsel to defend against the claim on bottomry. They appeared for the owner of the vessel, and answered in behalf of the owner; and also as agent or carrier, in behalf of the cargo. Some months afterwards the libelants, owners of the cargo, themselves intervened and answered separately by proctors and counsel of their own; and, after the decree in the district court, they represented mainly, if not solely, the interests of the cargo in that suit. The insurance companies had previously agreed to pay any sum which might be fixed by the average adjusters as general average. The libelants now sue for their expenses and counsel fees in that litigation.

In the present action the respondents have set up in defense the unseaworthiness of the vessel when she left Rio, and allege that the policies consequently never attached. As the claim in suit rests upon the stipulations of the policies only, there can be no recovery if the policies never attached nor became operative as respects the cargo. It is urged that this defense ought not to be regarded as made in good faith, because no such ground was taken in the previous litigation, and because the insurance companies did not act upon that theory; but during the progress of the action in the district court, at least, were active in defeating the bottomry bond upon other grounds. Two answers are given to this contention that I think are sufficient. No issue of unseaworthiness would have been material in the former action. On the contrary, the more unseaworthy the ship the greater would be her need of repairs at St. Thomas, where the bottomry bond was executed. The facts affecting the question of the seaworthiness of the ship at Rio were not at

first known to the insurers. When they were, in a measure, apprised of the facts, the counsel of the insurers stated to the libelants that these facts raised a question concerning their liability as insurers, although not material in the pending litigation. But that merely afforded to the insurance companies an additional ground of defense as insurers of the cargo. Considering the difficulties of establishing that defense before a jury, the insurance companies could not be considered as wholly indifferent whether the claim on bottomry was defeated upon another ground. The assistance of the insurance companies in the former litigation for a time, in no way misled the libellant, or induced them to incur any expense which they would not have otherwise have incurred. There is no element, therefore, of estoppel in the case; nor do I find anything in the circumstances that precludes an inquiry into the seaworthiness of the vessel, which is for the first time presented in this suit. On that point the evidence of the master, whose deposition was taken in this suit, but who was not examined in the former suit, is very strong, and shows clearly that the vessel was grossly unseaworthy when she sailed. There are several considerations which suggest a suspicion of great exaggeration in the master's testimony; but, after making all possible allowances for such exaggeration, the undisputed facts concerning the condition of the vessel when she arrived at St. Thomas, and the absence of any severe weather on her passage, would seem to necessitate the inference that she was unseaworthy when she left Rio. When sailing in only a fresh breeze, as it would appear, first her topmast, and then her cross-trees, gave way and fell down, and portions of the foremast were carried away. The testimony is that they were exceedingly rotten, and many parts of the hull were in a similar condition. Such extraordinary accidents require explanation, or the vessel must be held to have been unseaworthy when she sailed. No explanation was given; and it is not suggested that a satisfactory explanation through any extraordinary weather, or other cause, could be proved. I am obliged to hold, therefore, that the vessel was unseaworthy when she left Rio; that the respondents never became liable upon the policies; and, consequently, that they are not answerable for the expenses claimed. The libel is therefore dismissed, with costs. —

THE INSURANCE LAW JOURNAL.

VOL. XV.

MAY, 1886.

No. 5

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF MICHIGAN.

RICHELIEU & O. NAV. CO. }

vs.

BOSTON MARINE INS. CO.* }

In an action upon a policy of marine insurance, the protest, a copy of which was served with the proofs of loss, as the basis of the plaintiff's claim for the sum insured, was held admissible on behalf of the defendant.

The fact that such protest is not actually attached to the proofs of loss is immaterial, if it is referred to and described therein so that it may be identified.

Statements of the master made at the time the notary was reducing the protest to writing, explanatory of certain words used therein, are admissible as part of the *res gestæ*.

* Decision rendered, January 12, 1885.—From *Federal Reporter*.

A Canadian steamer, navigating Canadian waters, between two Canadian ports, is bound to comply with the statute of Canada with respect to the navigation of her waters; and an American insurance company, carrying a policy upon such steamer, must be held to have contemplated its requirements.

In the absence of an express stipulation in the policy, the underwriter is liable for losses resulting from negligence not amounting to barratry.

The violation of a statutory obligation, or a proved neglect to conform to the requirements of good seamanship, followed immediately by a disaster, raises the presumption that such neglect caused or contributed to it. This rule applies as well to actions upon policies of insurance as to actions for negligence.

A steamer provided with a defective compass, while running, in violation of law, at full speed in a fog, stranded upon a well-known reef. *Held*, That the violation of law and the unseaworthiness of the steamer raised the presumption that the stranding was the consequence of negligence and unseaworthiness, and were the proximate causes thereof.

A steamer equipped with a defective compass is unseaworthy, and, so far as such unseaworthiness is a defense to the underwriter, it is immaterial whether it is known to the owner or not.

This was an action upon a policy of insurance, whereby the defendant insured the steamer *Spartan* in the sum of \$10,000 against all losses occasioned by perils of the sea, "excepting all perils, losses, misfortunes, or expenses consequent upon and arising from or caused by the following or legally excluded causes, viz.: Damages that may be done by the vessel hereby insured to any other vessel or property; incompetency of the master or insufficiency of the crew, or want of ordinary care and skill in navigating said vessel, and in loading, stowing, and securing the cargo of said vessel; rottenness, inherent defects, overloading, and all other unseaworthiness; theft, barratry, or robbery." At the time of the loss, the *Spartan* was in the service of the Owen Sound Steamship Company, which had chartered her from the plaintiff in this case. The loss occurred June 19, 1883, while the steamer was bound upon her trip from Silver Islet, upon the north shore of Lake Superior, to Owen Sound, Ontario. When she left her port of departure, the weather was fair, and the steamer took a direct course for Whitefish Point by way of Passage Island. Midway between Silver Islet and Passage Island a dense fog arose, which continued more or less thick until the time of the stranding. She passed Passage Island in safety, and about 8 o'clock in the evening of the 18th was put upon a course which should have carried her about seventeen miles south of Caribou Island. Her navigation was left in charge of the second mate, Mr. Harbottle, who remained on watch until about half-past 1 o'clock in the morning of June 19th. Captain McGregor, the master, had retired to his berth about 8 o'clock in

the evening, after committing the charge of the vessel to Mr. Harbottle, and giving that officer the following written instructions for the navigation of the steamer: "If it continues thick at 10 o'clock p. m., keep her S. E. by E. until 3 a. m.: then keep her S. E. by E. $\frac{1}{4}$ E. small, etc. If it clears, continue on your course S. E. by E. $\frac{1}{4}$ E." The fog continued dense during the second mate's watch, and the steamer, under the instructions given, was run at full speed on the prescribed course, which was a quarter of a point more southerly than usual. About half-past 1 o'clock the first mate, Mr. Waggoner, came on watch, and relieved Harbottle, the second mate. The vessel was then running at full speed. The weather was thick, and the fog dense, and so continued all night. She continued to run, at the rate of about 18 miles an hour, in a fog so dense that "you could not see anything,—you could not see the length of the boat,"—as Waggoner stated it, until about 2:20 a. m., somewhat less than an hour after the change of watch, when she stranded on Caribou Island, and brought up about 400 feet from the shore. The weather was still so thick that the land could not be seen. There was no lookout maintained on the steamer, and no soundings taken, and the testimony indicated that "if the vessel had been running at half speed she might have been backed off." The defenses were that the losses were occasioned (1) by the want of ordinary care in the navigation of the vessel; (2) by her unseaworthiness in running with a defective compass. The jury returned a verdict for the defendant. The plaintiff moved for a new trial upon the grounds stated in the opinion of the court.

F. H. CANFIELD, *for Plaintiff.*

H. H. SWAN, *for Defendant.*

BROWN, J. It is insisted that the court erred:—

1. In admitting the protest made by the master and crew after the *Spartan* had been gotten off and taken to Windsor. The protest was admitted under the following circumstances: Plaintiff put in evidence the proofs of loss served upon the defendant. These proofs recited that "the said vessel, in the prosecution of a voyage, ran ashore on the northeast shore of Caribou Island, and became a wreck and total loss, and was duly abandoned by her owners to the insurers, as will appear by certified copies of the protest of her master and mariners heretofore served on you herewith." We think it clear that in an action on a policy of insurance the protest is not admissi-

ble on behalf of the plaintiff. It is true there are several American cases which hold otherwise, but the weight of authority is decidedly the other way. The protest stands in the same position as any other declaration made in the interest of the party offering it. It is not so clear, however, that it may not be put in evidence by the defendant, though the better-considered cases hold that it stands in the light of an ordinary admission made by an agent, which is not competent as against the principal unless it be part of the *res gestæ*. But where the protest is served with the proofs of loss, and made, in part, the basis of plaintiff's claim against the company, we think he should be held as so far making the statements his own that it should be admitted against him. It is true, a contrary ruling was made by the king's bench in *Senat vs. Porter*, 7 Term R., 158; but, notwithstanding the positive opinion of Lord Kenyon and his associates, the propriety of this decision may well be questioned. Indeed, we find it difficult to reconcile it with *Insurance Co. vs. Newton*, 22 Wall., 33, in which the proofs of loss consisted of affidavits giving the time, place, and circumstances of the insured's death, and the record of the finding of the jury upon the coroner's inquest. These were held admissible on behalf of the defendant. While the affidavits showed the fact of death, they also showed that the deceased committed suicide. It was held that, as they were intended for the action of the company, the latter had a right to rely upon their truth, and that, unless corrected for mistake, the insured was bound by them. "Good faith and fair dealing required that the plaintiff should be held to representations deliberately made, until it was shown that they were made under misapprehension of the facts, or in ignorance of material matters subsequently ascertained."

The fact that the protest was not attached to the proofs of loss is immaterial, for a paper referred to and described in a written instrument, so that it may be identified, is thereby made a part of the instrument the same as if it were incorporated with it: In *re Com'rs Washington Park*, 52 N. Y., 131; *Tonnele vs. Hall*, 4 N. Y., 140.

The case of *Senat vs. Porter* was followed by the same judge in *Christian vs. Coombe*, 2 Esp., 490, and is usually cited by the elementary writers upon marine insurance as settling the law upon that subject. But the tendency of the American and some of the more recent English cases is to hold that, wherever a party has offered or made use of the statements of a third person in any legal proceeding as the basis of a claim against another, it may be used as an admission

against him; thus, in *Brickell vs. Hulse*, 7 Adol. & E., 454, affidavits of third persons, used by a party on motion before a judge, were held to be admissible in evidence in a subsequent action against the party so using them. The case of *Atkins vs. Elwell*, 45 N. Y., 753, was an action brought to recover damages sustained by the plaintiffs by the fraud of the defendant on the sale of a ship to them. After the purchase, the ship was sent by the plaintiffs to San Francisco; but, encountering bad weather, she put into Rio Janeiro in distress, where a protest was made by the master before the consul. The defendant expressly denied making any representations as to her soundness, and offered in evidence the protest, as showing the statements of the master as to the soundness and condition of the ship at the time of the disaster. The court held it to be admissible. "It was a solemn instrument," said the court, "made by their agent, for their benefit, in the course of his duty. It was used by them in a matter of importance to them and others. It was used by them upon a question which was at issue in the action then upon trial, viz., the condition of a vessel at the time at which they in this action allege that she was unsound. How much weight should be given to it is not the point here. Whatever weight it had, the defendants were entitled to, as its statements, adopted by the plaintiffs, and used by them for their benefit in one instance, could not be repudiated by them in another." See, also, 1 Phil. Ev., 449: *Patapsco Ins. Co. vs. Southgate*, 5 Pet., 622. In *Marine Ins. Co. vs. Stras*, 1 Munf., 408; *Patterson vs. Insurance Co.*, 3 Har. & J., 71; and *Doherty vs. Farris*, 2 Yerg., 73,—the protest was offered by the plaintiff, and of course was ruled out.

In the view we have taken of this question, the fact that the master was not the servant of the plaintiff, but of the Owen Sound Steamship Company, becomes immaterial, since the plaintiff, by making the protest a part of the proofs of loss, has adopted and made it its own. It is not admitted at all upon the principle of agency.

2. The fact that the words "fog and defective compass" are not contained in the written part of the protest setting forth the facts of the disaster, but are interlined in the printed part, does not affect the admissibility of the protest; but we think it meets the objection made to the statements of the master at the time the protest was made. The witness Waggoner, in answer to the question whether, at the time the protest was made, the attention of the master was called to

the fact that the compass was defective, was permitted to answer that the master said that the compass was "a little out," and that he laid the disaster solely to the compass. This testimony was objected to upon the same ground as the protest, viz., that it was the admission of an agent after the event, and not a part of the *res gestæ*; and that it was not admissible to contradict the testimony of Captain McGregor, because his attention had not been called to it upon cross-examination. But we think it was competent, in connection with the fact of making the protest, to show that the attention of the master was called to the subject of the defective compass, and that the words "fogs and defective compass" were inserted in the protest with his knowledge. The statements were made in giving instructions to the notary with respect to the protest, which was in itself an official act and strictly within the line of the master's duty, and hence these statements do not fall within the ruling in *Packet Co. vs. Clough*, 20 Wall., 528, or *Insurance Co. vs. Mahone*, 21 Wall., 152, and the numerous other cases, wherein admission made after the event, and not in connection with the performance of any official act, were excluded. We think the admissibility of this testimony is rather controlled by the cases of *Kirkstall Brewery Co. vs. Furness Ry. Co.*, L. R. 9 Q. B., 468; *Railroad Co. vs. Butman*, 22 Kan., 639; *Xenia Bank vs. Stewart*, 114 U. S., 224; s. c. 5 Sup. Ct. Rep., 845; *Morse vs. Connecticut R. Co.*, 6 Gray, 450; *Dowdall vs. Pennsylvania R. Co.*, 13 Blatchf., 403. In all these cases the statements related to a past transaction, but they were made in connection with an act itself within the scope of the agent's duty, and were admitted upon that ground. In this case the admission is no broader than the statement of the master upon the stand that he could account for the loss in no other way; but it shows that his attention was directed to that feature of the case at the time the protest was made, and that it was not inserted by the notary upon his own motion. Indeed, he testified that he had the words inserted himself. Under these circumstances, it is difficult to see how the plaintiff was prejudiced by its admission. If we suppose it to have been ruled out, the testimony of the master as to the defective condition of the compass would still remain, and the general purport of the evidence would be the same, even if the testimony were technically incompetent. The plaintiff suffered no injury by its admission, and has therefore no legal cause for complaint: *Cooper vs. Coates*, 21 Wall., 105; *Allen vs. Blunt*, 2 Wood & M., 128.

3. Objection was also made to the admission of the Canadian statute requiring moderate speed in a fog, upon the ground that it was intended to apply only to cases of collision, and also because the statutes of Canada are not enforceable in this court. The objection is without force. The act is entitled "An act to make better provision respecting the navigation of Canadian waters;" and, while it is intended primarily to lay down certain regulations for the prevention of collisions, the provisions of the act are general, and require the observance of the regulations under all circumstances. We are cited to no authority that acts of this description, and they are universal in all maritime countries, are limited in their application. In the Case of *Kestrel*, 4 Asp., 435, the act was treated as obligatory in a proceeding to suspend the certificate of the master of a vessel for his negligence in permitting her to be stranded. The *Spartan* was a Canadian vessel, and was navigating Canadian waters between two Canadian ports, and was bound to comply with the laws of Canada, and the insurers must be held to have contemplated this requirement in issuing the policy: 1 Phil. Ins., Sec. 736; *Peters vs. Warren Ins. Co.*, 14. Pet., 99, 112. So far, however, as the question of speed is concerned, the point is hardly worth discussing, as the Canadian statute is the same as our own upon the subject. Indeed, these rules of navigation are now recognized as general laws of the sea, and constituting a kind of international code: *The Scotia*, 14 Wall. 171.

4. It is further claimed that the court erred in charging the jury that, "as the *Spartan* was violating the statute laws of Canada in running at full speed in a dense fog, plaintiff must show affirmatively that neither the speed of the steamer nor the defects of the compass could have caused or contributed to the stranding of the steamer, and that the burden of proving a loss of this kind is upon the plaintiff. There is no presumption that the loss was caused by a peril insured against by the defendant." This charge is claimed to have been erroneous, because it puts the burden of proof upon the wrong party. There is no doubt of the correctness of the general proposition that, in the absence of a specific stipulation in the policy, the insurer is liable for losses resulting from negligence not amounting to barratry: 1 Pars. Ins. 534, note; *Waters vs. Merchants' Louisville Ins. Co.*, 11 Pet., 213; *National Ins. Co. vs. Webster*, 83 Ill., 470; *Fireman's Ins. Co. vs. Powell*, 13 B. Mon., 311; *Citizens Ins. Co. vs. Marsh*, 41 Pa. St., 386; *Busk vs. Royal Exch. Assur. Co.*'

2 Barn. & Ald., 73; Walker vs. Maitland, 5 Barn. & Ald., 171; Bishop vs. Pentland, 7 Barn. & C., 219.

In the American cases it is broadly held that the underwriters are liable for losses occasioned by negligence. In the English cases it is discussed in a somewhat misleading manner as a question of remote and proximate cause, as if the insurer would not be liable if the negligence were the immediate cause of the loss; but we find no case holding directly that he would not be so liable. The true distinction seems to have been between cases of accidental or negligent stranding, and those wherein the stranding was one of the ordinary and expected incidents of the voyage: *Hearne vs. Edmunds*, 1 Brod. & B., 388; *Bishop vs. Pentland*, 7 Barn. & C., 219; *Rayner vs. Godmond*, 5 Barn. & Ald., 225. In the latter case the insurers would not be liable.

In this case, however, there is an express exception of all perils and losses occasioned by the want of ordinary care and skill in navigation, and all unseaworthiness. In this connection we understand it to be the law that the violation of a statutory obligation, or a proved neglect to conform to the requirements of good seamanship, followed by a disaster, raises the presumption that such neglect contributed to it. This has been reiterated so many times in collision cases as to have become elementary: *Lownd. Col.*, 88; *The Genesee Chief*, 12 How., 447, 463; *The De Soto*, 5 How., 465; *The Pennsylvania*, 19 Wall., 136; *The Fenham*, L. R. 3 P. C., 212; *The Lion*, 1 Spr., 44, 40; *The Northern Indiana*, 3 Blatchf., 92, 106; *The Leo*, 11 Blatchf., 225; *The Voorwarts & Khedive*, 5 App. Cas., 894, 900. In *Taylor vs. Harwood*, Taney, 437, 444, the chief justice stated, in general terms, that "the omission of a known legal duty is such strong evidence of negligence and carelessness that, in every case of collision happening under such circumstances, I should hold the offending vessel as altogether at fault, unless clear and indisputable evidence established the contrary." We understand this principal to be of general application in all actions where the question of negligence is involved: *Shear. & R. Neg.*, § 484. In *Jetter vs. New York & H. R. R.*, 2 Keyes, 154, a charge that a street car proceeding at a rate forbidden by the city ordinances would render the company liable, because in such case the accident would be the result of their violating the city ordinances, was held to be proper, notwithstanding the decision to the contrary in *Brown vs. Buffalo & S. L. R. R.*, 22 N. Y., 191; relied upon by the plaintiff here. See, also, *Massoth vs.*

Delaware & H. C., 64 N. Y., 524; Langhoff vs. Milwaukee R. Co., 19 Wis., 489; Hayes vs. Michigan Cent. R. Co., 111 U. S., 228; s. c. 4 Sup. Ct. Rep., 369. All the authorities are reviewed in an elaborate opinion in Grey's Ex'r vs. Mobile Trade Co., 55 Ala., 387, and the case of Brown vs. Railroad Co., 22 N. Y., 191, distinctly repudiated.

The seventh section of the Canadian statute, already referred to, provides expressly that, in case of any damage to person or property arising from the non-observance by any vessel or raft of any of the rules prescribed in the act, "such damage shall be deemed to have been occasioned by the willful default of the person in charge of such raft, or of the deck of such vessel at the time, unless the contrary be proven or it be shown to the satisfaction of the court that the circumstances of the case rendered a departure from the rules necessary."

It is claimed, however, that this rule, enforced so often in cases of collision and in actions for negligence against carriers, should not be applied in actions upon policies of insurance, for the reason that the carrier is not exempted if his negligence contributes to the loss, notwithstanding the loss itself may be occasioned by a peril of the sea, while the insurer is liable wherever a peril of the sea contributes to the loss, though the ship may have been placed in such peril by the negligence of the insured. If this were true as a universal proposition, the exception in the policy of perils and losses consequent upon and arising from or caused by want of ordinary care and skill, would be of little or no avail, for no matter how gross the negligence or how direct the loss consequent thereon, if a peril of the sea intervened to produce the disaster, the company would be liable. The exception is not only of all "losses and misfortunes," but of all "perils" caused by negligence. The inference from this is that the company would be exonerated notwithstanding the immediate loss be by a peril of the sea, if such peril arose from negligence or unseaworthiness. It is not intended, in this connection, to impugn the authority of the numerous cases which hold that, where the negligent act has ceased to operate at the moment of the disaster, such disaster shall be referred to the peril, rather than to the negligence. Examples of such are *Morrison vs. Davis*, 20 Pa. St., 171; *Denny vs. New York Cent. R. Co.*, 13 Gray, 481; *Daniels vs. Ballantine*, 23 Ohio St., 532; *Railroad Co. vs. Reeves*, 10 Wall., 176; *Souter vs. Baymore*, 7 Pa. St., 415. But where the negligent act continues to be operative up to the very instant of the loss, we find it difficult to escape the conclusion that it is a "peril" caused by negligence, and

by negligence alone, even if the loss itself were to be attributed to the peril rather than to negligence.

The case of *Waters vs. Merchants' Louisville Ins. Co.*, 11 Pet., 213, is a leading case upon the question of proximate and remote cause. The policy was general, containing no exception of this kind, and the court held the company not liable for barratry, though liable for negligence, and that a loss by fire, intentionally set by the master and the crew, was a loss by barratry. "Such a loss," says Mr. Justice Story, "is a peril and loss attributable to the barratry as its proximate cause, as it concurs, as the efficient agent, with the element *eo instanti* when the injury is produced. If the master or the crew should barratrously bore holes in the bottom of the vessel, and the latter should thereby be filled with water, and sink, the loss would probably be deemed a loss by barratry, and not by a peril of the sea or rivers, though the flow of the water should co-operate in producing the sinking." This language appears to be somewhat in conflict with that used by the English courts, with respect to proximate and remote cause, in *Busk vs. Royal Exch. Assur. Co.*, 2 Barn. & Ald., 73; *Walker vs. Maitland*, 5 Barn. & Ald., 171, and *Bishop vs. Pentland*, 7 Barn. & C., 219. In the subsequent case of *Insurance Co. vs. Transportation Co.*, 12 Wall., 194, 199, it is said that, "when one of several successive causes is sufficient to produce the effect (for example, to cause a loss), the law will never regard an antecedent cause of that cause or the *causa causans*. In such a case, there is no doubt which cause is the proximate one, within the meaning of the maxim. But when there is no order of succession in time, when there are two concurrent causes of loss, the predominating efficient one must be regarded as the proximate when the damage done by each cannot be distinguished."

It is only within a comparatively few years that the clause exempting the underwriter from the consequences of negligences has been introduced into marine policies, and hence cases involving the construction of this clause are not numerous; but we take it that wherever, under the ordinary form of a policy, the insurer would be exonerated from the consequences of a peril occasioned by barratry, he would, under this clause, escape liability if the peril were occasioned by the negligence of the master and crew, and that this is a question for the jury in each case: *Milwaukee Ry. Co. vs. Kellogg*, 94 U. S., 469. This appears to have been the construction given to a similar provision by Mr. Justice Woods in *Levi vs. New Orleans Ins. Ass'n*, 2 Woods, 63, which was an action upon a policy

to recover a loss resulting from a collision occasioned by the negligence of the pilot of the insured vessel. The fault committed by the vessel was in the non-observance of a rule or custom of the river, that ascending boats should run under the points near the shore, so as to avoid the current, while descending boats followed the main channel of the river, so as to take advantage of the current. The policy provided that the boats should be navigated "free from any loss or damage by barratry, or by the negligence of those in charge of the boat, at or before the time of any accident or disaster;" and it was held that, as there was negligence in the management of the insured vessel at the time of the collision, there could be no recovery. See, also, *St. John vs. American Mut. Ins. Co.*, 11 N. Y., 519; *Lund vs. Tyngsboro*, 11 Cush. 563; *Butler vs. Wildman*, 3 Barn & Ald., 398.

In *Thompson vs. Hopper*, 6 El. & Bl., 937, which was an action upon a time policy, it appeared the plaintiff sent the ship to sea in an unseaworthy state, and caused her to anchor in the offing in that state. While there, she was caught in a storm, and driven ashore. There was evidence from which the jury might have drawn the conclusion that, although the unseaworthiness was not the immediate cause of loss, the loss would not have occurred if the ship had been seaworthy when she went to sea. It was held that the defense was made out if the misconduct of the plaintiff occasioned the loss, though it was not its immediate cause. In delivering the judgment, Lord Campbell observed:—

"Is it to be said, then, that, to exempt the assurers from liability, the misconduct of the assured must be the direct and proximate cause of the loss? We think that, for this purpose, the misconduct need not be the *causa causans*, but that the assured cannot recover if their conduct was *causa sine qua non*. In that case they have brought the misfortune upon themselves by their own misconduct, and they ought not to be indemnified. The very object of insurance is to indemnify against fortuitous losses which may occur to men who conduct themselves with honesty and with ordinary prudence. If the misconduct is the efficient cause of loss, the insurers are not liable."

In *Ionides vs. Universal M. Ins. Co.*, 14 C. B. (N. S.), 279, a policy of insurance on a ship-load of coffee contained the words: "Free of capture, seizure and detention, and all the consequences thereof, and of any attempt thereat, and free from all consequences of hostilities, riots, and commotions." The ship was wrecked on Cape Hatteras, where there was a light-house, the light of which, however,

had been extinguished by the Confederates. A large portion of the cargo might have been saved had not the Confederates prevented it. It was held that there was a total loss, by perils of the sea, of that portion of the cargo which could not have been saved, notwithstanding the hostile extinguishment of the light, but that the loss of that part which might have been saved but for the interference of the Confederates was a consequence of hostilities, within the exception of the policy, and therefore, as to that portion, the insurers were not liable. The case is a very instructive one upon the subject of proximate and remote cause, and apparently is in full accord with that of the supreme court in the case of *Waters vs. Merchants' Louisville Ins. Co.*, 11 Pet., 213.

We see nothing inconsistent with these cases in the subsequent ones of *Dudgeon vs. Pembroke*, 1 Q. B. Div., 96, s. c., 2 App. Cas., 284, and *West Indies, etc., Co. vs. Home, etc., Ins. Co.*, 6 Q. B. Div., 51. Nor are we much impressed with the distinction drawn in one or two cases between actions upon bills of lading and upon policies of insurance, with respect to the liability of the defendant for losses occasioned by a peril of the sea. This distinction seems to be repudiated in the case of *The Portsmouth*, 9 Wall., 684, and even if sound, is without force in the construction of the policy in this case. Few of the English cases are of any value, as their policies do not seem to contain the proviso exempting the underwriter from perils and losses occasioned by negligence and unseaworthiness.

We have found it impossible to reconcile our views, as to the proper construction of this policy, with the opinion of the Illinois court of appeals in *Greenwich Ins. Co. vs. Raab*, 11 Bradw., 636, in which it was held, under a policy of this description, that the underwriter was liable notwithstanding the loss was produced by the want of care in the navigation of the vessel. The cases of the *National Ins. Co. vs. Webster*, 83 Ill., 470, and the others cited in support of this conclusion, are not controlling, as the policies in none of them contained this provision. We think the learned court was misled by the language of the early English cases.

We have no criticism to make of *Western Ins. Co. vs. Cropper*, 32 Pa. St., 351, and *Commonwealth Ins. Co. vs. Cropper*, 21 Md., 311, as the question in each case was as to the extent of the liability of the company under what was known as the "steamboat clause." The opinions throw no light upon the present controversy.

Upon the whole we have come to the conclusion that there was no error in the instruction complained of. If there be any signifi-

cance at all to the exception of perils and losses caused by negligence or unseaworthiness, they surely ought to suffice for the exoneration of the underwriter in a case where a steamer, equipped with a compass known to be defective, is driven in a dense fog, with unabated speed, and in direct violation of a local statute, upon an island lying but eight miles off her usual track. To say that, under such circumstances, the negligence or unseaworthiness was not the proximate or efficient cause of the peril or loss seems to us a distinction too subtle and refined for the ordinary apprehension. It is difficult to conceive of a loss by negligence or unseaworthiness, unconnected with a sea peril. But under this policy, if the peril be so produced, the subsequent loss is within the exception. The question as to the cause of the loss was fairly left to the jury, and we see no reason to differ from their finding.

5. That the court erred in charging the jury that "if there were any defects in the compass, known or unknown, rendering it unsafe or unsuitable for use in Lake Superior, and the stranding of the vessel was caused by or consequent upon or arose from such defects in the compass, the vessel was not seaworthy for Lake Superior navigation, whatever her fitness for navigation elsewhere, and the plaintiff cannot recover." It may be assumed that there is no implied warranty of seaworthiness in a time policy, and the mere fact that the vessel was unseaworthy would not preclude a recovery in case of a loss unconnected with the defect; but the policy contains an express exception of liability for losses occasioned by this cause, and whether it was known or unknown would be immaterial. The exception amounts to a warranty that the loss shall not be caused by unseaworthiness, and the ignorance of the owner of the defect in the compass would not affect his right to recover: *The Glenfruin*, 5 Asp., 413; *Work vs. Leathers*, 97 U. S., 379; 1 Pars. Ins., 337, 368.

This covers all the points made in the briefs of counsel. The motion for a new trial must be denied, and judgment will be entered upon the verdict.

SUPREME COURT OF OHIO.

MANHATTAN LIFE INS. CO. }

vs.

SMITH.* }

Where, by the terms of a contract of life insurance, the beneficiary named in the policy is entitled to participate in the profits, a portion of which, in the form of dividends, is to be applied each year in reduction of premiums, and it has been the uniform practice of the company to give timely notice of the amount of premium, amount of dividends, and of the balance to be paid in cash, and the company neglects to give such notice, having knowledge of the residence of the beneficiary, and by reason thereof a premium is not paid at the time specified in the policy, the company cannot set up such failure to pay as a defense to a recovery upon the policy, although by its terms the same is to be forfeited in case of failure to pay a premium upon any of the dates stipulated therein.

In such case, where the company has uniformly sent the notices to the insured (the husband of the beneficiary) and he has made payment of premiums from year to year, the law will treat him, in making such payments, as agent for the wife, but where it is shown to the company by letters from the husband very shortly after notice sent, that he and the wife have separated, she having commenced a proceeding for alimony against him, and that he is desirous of having the policy changed and made payable to his estate, the company is not justified in treating him as her agent, for the purpose either of receiving notice for her, or of making a surrender of the policy.

And in such case an attempt by the husband, without knowledge of the wife, to surrender the policy to the company is inoperative, and the rights of the wife are not thereby impaired.

Where, in such case, the company repudiates the contract, and by its course of conduct clearly indicates that a tender of the premium after the death of the insured, if made, would not be accepted, a failure to make such tender will not bar a recovery on the policy.

Motion for leave to file petition in error to the Superior Court of Cincinnati.

The material facts, as shown by the record, are as follows : June 4, 1863, the Manhattan Life Insurance Company issued to Rosehannah Smith an ordinary life policy upon the life of her husband, John W. H. Smith, of Cincinnati, Ohio, for three thousand dollars. The

* Opinion filed, March 9, 1885.

premium, \$75, was payable June 4th of each year, the beneficiary being entitled to participate in the profits, and the dividend each year to be deducted from the premium. The policy contained a forfeiture clause to the effect that if the premiums should not be paid when due the company should not be liable for payment of the sum assured, or any part thereof, and the policy should cease and determine. The application is in the name of the wife. The first premium was acknowledged as being received from her, and future premiums were to be paid by her. The husband kept the policy in his possession and transmitted to the company the premiums until and including the premium due June 4, 1879. In that year Smith and his wife had difficulty, and in the month of October she commenced an action in the court of common pleas of Hamilton County against him for alimony. They, at that time parted, and did not afterward resume marital relations. Both lived in the city of Cincinnati, which had been their home during the existence of the policy, he being engaged in business at the corner of Fifth Street and Central Avenue. In the month of April, 1880, the husband received a notice from the company dated April 24th, informing him that the premium would be due the 4th of June following, and making this statement: Premium \$75; less dividend, \$24; cash to be paid, \$51. The company had uniformly sent him a notice each year about the same length of time before June 4th, containing a similar statement, showing amount of premium, amount of dividend, and balance to be paid in cash, and the amount paid was uniformly the annual premium less the dividend for the year.

Upon receipt of notice, Smith wrote the company under date of April 27, asking if there was any way in which he could have the policy transferred; that he did not desire to continue it in his present form, as his wife was otherwise provided for, and asking if he could get a paid-up policy. To this the company replied that the only change that could be made was to issue a paid-up policy in its stead for \$810, without profits, and that if he wished this, to forward the policy and renewals prior to June 4. Smith replied by letter, of which the following is a copy:—

“CINCINNATI, May 3, 1880.

“DEAR SIR: In reply to your favor of April 29, in regard to paid-up policy, would say I desire to have it changed, and inclose the policy and renewals as requested. I will say that my wife has separated from me, and sued for alimony on the charge of not having provided for her. This is notoriously false, but, of course, does not

particularly interest you. I greatly desire that the policy should be made payable to my estate, if it can be done, but, as I am obliged to provide for her with alimony, or otherwise support her, and as she is no longer a wife to me, I desire my children to have the benefit, if any. Some of the renewal receipts have been mislaid, but I return the last."

This elicited from the company a letter dated May 6, acknowledging receipt of the policy, stating that "no change can be made in this until the 4th day of June next, at which time we will give it our attention," adding that all the renewal receipts had not been returned, and requesting that careful search for the others be made, and that they be forwarded.

May 19, he wrote: "Replying to yours of the 6th, I herewith inclose you all the certificates that I have been able to find." On the 26th the company again wrote to him: "We notice that the renewal receipts for the years 1865, 1869, 1870, 1871, 1873, 1874, and 1877 are missing, and request that you make a search for them, and failing to find them, that you make an affidavit stating the circumstances of the loss, and that search had been made." This ended the correspondence, and nothing further appears to have been done during Smith's life. Rosehannah Smith was not consulted, and had no knowledge of these negotiations. He died on the 11th of January following.

Besides the dividends, the policy earned additions yearly; so that at the time of the attempted surrender, Mrs. Smith would have been entitled, upon surrender, to a paid-up policy for over eight hundred dollars. No paid-up policy for any amount had been in fact written up to the date of Smith's death.

Rosehannah Smith was aware that a policy in this company on her husband's life for her benefit had been issued. She did not know its date, though she knew it had been in existence a good many years, nor did she know the amount of the premium, nor when due. She received no notice from the company at any time, or from any source, as to the premium due June 4, 1880, nor did she know that any premium remained unpaid until a short time before suit brought. She has not paid that premium, nor tendered it, except that in her petition she offers to pay it in any way the court may direct. No notice of any intention to forfeit the policy was given her by the company. During the summer of 1880, and afterward, the company had an agent at Cincinnati. Mrs. Smith continued to reside there, and her place of residence was easily ascertainable.

This action is brought on the original policy to recover the three thousand dollars therein stipulated to be paid upon the death of John W. H. Smith. A verdict was rendered against the company for the above amount, less the premium due June 4, 1880, and interest, upon trial in the superior court. Motion for new trial was reserved for decision of that court in general term. There the motion was overruled and judgment entered on the verdict.

McGUFFEY & MORRILL, *for the Motion.*

JOHN W. HERRON, *Contra.*

SPEAR, J.

At the outset we inquire: Had the husband, independent of any relation as agent for the wife, power to surrender the policy? He could stop paying premiums. That would have left the wife to continue the policy in force for its full amount by herself, making payment of premiums; or, she could have declined to pay and receive a paid-up policy for a lesser amount, and this she would do, not by the grace or favor of the company, nor yet by virtue of any new agreement with the company, but by force of the original contract and the law applicable thereto.

It is now too well settled to admit of dispute that a beneficiary for whose benefit a promise has been made by one upon a sufficient consideration moving from a third person, may maintain an action upon that promise; and if the beneficiary has acted on the promise so as to have changed position or acquired a vested right, the contract cannot be changed without his consent. The case at bar is a stronger case than the one supposed in that the application was made in the name of the wife and the contract itself made directly with her, though the risk was on the life of the husband. There was value in the policy, and at least to that extent the wife's right in it was a vested right. She was the beneficiary named in it, and upon both reason and authority we think it clear that no new contract or arrangement of any kind which affects the vested rights of the beneficiary in the policy can be made with the company alone by the insured: Bliss, Life Ins., secs. 337, 345, 571, and the cases cited by counsel abundantly sustain this position. We conclude that the husband in this case had no power to surrender the policy merely because he was the insured party and had paid premiums. Had he any other standing regarding the transaction which gave him such right? In the payment of premiums he, in law, was her agent. If he had the right to act for her at all it was because of this relation as agent. Was he her agent at the time he attempted to surrender this

policy? And what was the company, with the knowledge furnished by the letters as to his attitude toward his wife, bound to understand? By his letter of April 27, in which he inquired if the policy could be transferred, he gave the company to understand that he was seeking a result on the face of the transaction inconsistent with her interests. This was, of itself, significant and suggestive. And when it was followed by the letter of May 3, giving the information that his wife had separated from him and sued for alimony, and renewing his request that the policy be made payable to his estate because he was obliged to provide her with alimony, and because she was no longer a wife to him, it is idle to claim that the company was not apprised of facts from which it was bound to presume that his relation of agent had ceased. He could not have made the fact clearer had he included a direct statement to that effect. The relation of principal and agent implies trust, confidence. Here was antagonism, and a direct effort to sacrifice her rights for his benefit. The company was bound to know that as agent he could not lawfully do that. The husband not having any authority then, either by reason of having paid premiums, or by his position as the insured in the policy, nor yet as agent for the wife, to make a surrender, it follows that the attempted surrender of the policy was inoperative, and that the rights of the beneficiary were not impaired by the attempt.

But the company claims that, independent of the question of surrender there can be no recovery beyond the sum of \$810, because the policy was forfeited by the failure to pay the premium due June 4, 1880. To this it is replied that there could be no forfeiture without notice to the beneficiary, such as had been uniformly given during the entire life of the policy, and that she had not, up to the commencement of the suit, been notified either of the amount of the premium to be paid, or of any purpose on the part of the company to forfeit the policy. On this question of notice the company insists that the notice given the husband was in law a notice to the wife, for that, whatever was the fact as to his agency at the time his letters to the company were written, they do not show when the separation took place, and for all that appears, it was after the notice of April 24, 1880, was received by him. We confess we are unable to perceive the force of this claim. As early as the 29th of April, five days after the notice was mailed, the company was apprised that Smith was acting contrary to the interest of his wife, and seven days later a full disclosure of his purpose was made. In the light of

these facts, and the irresistible inferences to be drawn from them, it will hardly do to claim seriously that the company was justified in assuming that he was agent for the wife April 24. As matter of fact the alimony suit had then been pending about six months. It being shown, therefore, that notice to the husband was not notice to the wife, and it appearing further that she had no actual notice, we are led to inquire what effect this state of facts has upon the rights of the parties.

It will be borne in mind that by the contract Mrs. Smith was entitled to share in the profits of the company, and that, as to part of their profits they were paid out by annual dividends, the remaining portion being retained by the company and insuring to her benefit by accretions to the policy, and that the uniform custom had been that the company should give timely notice, not only of the date when the amount to be paid as premium would become due, but as well the amount of the dividend and the amount of balance to be paid in cash. What dividend in any year was declared, and what amount could be used to reduce the premium, were facts known to the company, but not to the insured. Without this information the insured, or beneficiary, could not, in the ordinary course of business, know how much was to be paid as premium each year, and could not, therefore, pay it. The case is to be distinguished from one where the premium is a fixed amount; and from a case slightly differing, where though there may be dividends which the policyholder, at his option, may have applied on the premium, there is no agreement and uniform practice that the dividends are to be deducted each year from the premium and the balance only paid to the company. It may, probably, be safely conceded that in either of the two supposed cases the assured would have no right to depend upon a notice from the company, not even if the company had ordinarily sent such notice. For the very life of successful life insurance depends upon prompt payment of premiums, and their business would be thrown into utter confusion if companies had no means of protecting themselves by forfeiture for non-payment of premiums. But, while this is true, the contract is nevertheless an entire one of assurance for life, and the payment of the premiums, after the first, is not a condition precedent, but a condition subsequent, and the parties may deal in such way between each other as to estop the company from insisting upon a forfeiture where it would be inequitable for a forfeiture to be declared.

Can the company insist upon a forfeiture in this case? The pre-

miums were paid regularly for sixteen years; the company undertook to make a new contract with a person wholly without authority to act for Mrs. Smith, ignoring her altogether; her residence was given in the application as at Cincinnati, and the presumption would be that she continued to reside there; the exact place of residence was not hard to find; the company had an agent in the city all the time, and could, without trouble, have given her notice, but no effort, even of the slightest character, was made to acquaint her with that which she, of all persons, was interested in knowing and entitled to know. Courts are liberal in construing transactions in favor of the avoidance of a forfeiture. There are no presumptions in favor of a right by forfeiture, for forfeitures are abhorred in equity and are never favored in law. Upon the facts shown, it appears manifest that the claim of the insurance company is inequitable, and we are of opinion that it is not maintainable in law.

A recent case decided by the Supreme Court of the United States is believed to entirely cover the question here involved as to the effect of failure to give notice. We refer to *Phoenix Ins. Co. vs. Doster*, 106 U. S., 30, and quote from it sufficiently to show its application to the case at bar. The policy was issued September, 1871, upon the life of Jackson Riddle, in consideration of the payment by the wife and children of the insured (who were named as payees in the policy) of the sum of \$215, and the annual payment of a like amount on or before the 20th of September in every year during its continuance, and contained a stipulation that if the premium be not paid on or before the day of maturity the company should not be liable for any part of the sum insured, and the policy to cease and determine, all previous payments being forfeited. The policy was upon the half-note plan which gave the insured the right to discharge one-half of the first four premiums by notes, and upon the fifth and subsequent payments to have his dividends, if any, applied in reduction of the premium. Notices were sent to the insured prior to the 20th of September in 1872, 1873, and 1874, showing when premium became due, amount of cash to be paid, interest on the notes, and amount for which additional note was required. Prior to the 20th of September, 1875, notice to the insured was sent which stated amount of dividend to be applied in reduction of that premium, interest to be paid on notes previously executed, and the sum to be paid in cash.

On the 6th of October, 1876, the insured lost his life in a railroad accident, leaving unpaid the premium due on the 20th of

September previous, though before starting from home he had made arrangements to pay the amount required as soon as notice was received. His residence and post-office for more than a year had been at Oxford, Ind., which was known to the company's general agent at Chicago. On the 4th of October, 1876, there was sent from the general agent's office, addressed by mistake, to the insured at Fowler, Ind. (where he never resided), a notice similar to that given in 1875. This was received by a son of the insured the day the father was killed. On the 9th of October, 1876, the amount due was tendered to the company's general agent at Chicago. He declined to receive it on the ground that the policy lapsed by reason of non-payment of premium due the 20th of September, 1876.

On the trial in the circuit court, the court charged the jury, among other things, to the effect that "if they found from the evidence that it had been the invariable custom of the company to transmit to the insured a statement of the amount of the premium due, after deducting the dividend, with a notice of the time when, the place where, and the person to whom, the premium could be paid, then the insured had good reason to expect and rely on such statement and notice being sent to him ; and that if the company by its managing agent, had notice of the post-office address of the insured before the usual time of sending out notice, but failed and neglected to transmit such statement and notice until the 4th of October, and the same did not reach him or the payees in the policy until the 6th, and that the insured or payees were ready and willing to pay said premium when notice and statement should be received, and by reason of such failure to send the notice and statement, and of that alone, the premium due in September, 1876, was not promptly paid; and that in a reasonable time thereafter the payees tendered the full amount of the premium, then the policy did not lapse or become forfeited, notwithstanding the premium was not paid on the day named in the policy, and in the lifetime of the insured."

A judgment was rendered against the company and the case taken up on error to the supreme court. The opinion was delivered by Justice Harlan, who, in commenting upon this part of the charge, uses this language : "We are of opinion that these propositions are substantially correct. Nor do we perceive that the rulings of the court below are in conflict with our decision in *Thompson vs. Ins. Co.*, 104 U. S., 252. * * * The present case has features which plainly distinguish it from the *Thompson* case. In the former there

was a tender of the premium within a few days after the death of the insured, and as soon as the payees ascertained the sum required to be paid. In the latter, the amount to be paid was fixed. It was not liable to be reduced on account of dividends or for any other reason, and the insured, therefore, knew the exact amount to be paid in order to prevent a forfeiture of the policy. Now, although the policy issued upon Riddle's life required payment annually of a specific sum as a premium, that stipulation must be construed in connection with the agreement set out in the application, that the premium might be discharged *pro tanto* by such dividends as were allowed to the insured from time to time. Whether the company, in any particular year, declared dividends, and what amount was available in reduction of the premium, were facts known in the first instance only to the company, which had full control of the matter of dividends. It certainly was not contemplated that the insured should every year make application, either at the home office or at the office of its general agent, in order to ascertain the amount of dividends. The understanding between the parties upon this subject is, in part, shown by the practice of the company. Independently of that circumstance, and waiving any determination of the question whether the forfeiture was not absolutely waived by the act of the general agent in sending notice to the insured after the day fixed for the payment of the premium due September 20, 1876, it was, we think, the company's duty under any fair interpretation of its contract, having information as to the post-office address of the insured, to give seasonable notice of the amount of dividends, and thereby inform him as to the cash to be paid in order to keep alive the policy. It did, as we have seen, give such notice in 1875, and received payment of the amount due after the date fixed in the policy. Within a reasonable time after the notice for 1876 came, in due course of mail, to the hands of one of the payees, a tender of the amount was made. No such features were disclosed in the Thompson case, and they are, as we think, sufficient not only to distinguish the present case from that one, but to authorize the instructions of which the company complains."

Undue importance must not be given to the fact of preparation by the insured for the payment of premium before leaving home. The date of leaving home is not disclosed, and for aught that appears the preparation may have been made after the 20th of September. At best its tendency was but to show readiness on his part to comply. The fact is not alluded to at all by Justice Harlan in his comments

upon the action of the court below. It will be observed that a point of difference in the two cases is that in the Riddle case tender was made; in this case it was not. But it must be kept in mind that a notice which the company's agent sent actually reached one of the beneficiaries the day of his father's death, and he had, therefore, the information on which to act. Mrs. Smith had no information, and the neglect of the company was the cause of that ignorance. The beneficiary in the Riddle policy was apprised of the sum to be paid, and that it was due; the beneficiary in the Smith policy was kept in ignorance of that sum and of time for payment. There are other questions involved in the Riddle case, but they are not believed to at all affect the case before this court.

The action of the company in the case at bar was in effect a repudiation of its promise to pay the amount stipulated in the policy. Even had Mrs. Smith learned the amount and time of payment after the death of her husband, a tender would have been a useless ceremony. "On general principles, when the act of one party, to whom another is bound to tender money, services, or goods, clearly indicates that the tender, if made, would not be accepted, the other party is released from technical performance of his agreement. The law never requires a vain thing to be done." *Isham vs. Greenham*, 1 Handy, 361. See also *Brock vs. Hidy*, 13 Ohio St., 310. Notice was essential to a forfeiture. The company gave none, and by its course of action waived the forfeiture which might have arisen by non-payment of premium due June 4, 1880, and it is now estopped from setting it up.

We are aware that the views herein expressed as to the effect of failure to give notice are not in accord with a number of reported cases, but they are directly supported by the decision of the highest court in the land and, inferentially, by decisions of many other courts, and we believe they rest upon the firm ground of sound principles.

There was no error in the instructions given the jury at the trial, nor in the refusals to charge as requested, and an examination of the record discloses no error in the admission or exclusion of testimony prejudicial to the company. It follows that the action of the court at general term in overruling the motion for a new trial and entering judgment on the verdict was not erroneous.

Motion overruled.

Johnson, J., did not sit in this case.

SUPREME COURT OF INDIANA.

From the Putnam C. C.

NORTHWESTERN MUT. LIFE INS. CO. }

vs. }

SARAH S. HAZELETT.*

The copying of the policy and application in the transcript immediately after the complaint is a sufficient filing of a copy with the complaint.

A printed stipulation provided among other things that in case of excessive intemperance the policy should be absolutely forfeited. Another stipulation which was complete in itself provided that in such case the company might cancel the policy and absolve itself from liability, except for the surrender value.

Held, That a forfeiture will be enforced where required by the terms, but where conditions are inconsistent that most favorable to the insured will prevail.

Held, That in order to absolve itself from liability the company must cancel and a demurrer on the ground of failure so to do will be sustained.

A stipulation providing that the policy shall be void if the insured die by his own hand whether sane or insane is a protection to the insurer in case of voluntary and intentional self-destruction, but does not apply to an unintentional death by his own hand, or the result of accident. A death unintentionally resulting from an overdose of whisky is not within the provision.

A voluntary act whose probable result on account of an enfeebled condition would be death, is not a violation of the provision, unless intended to have that effect.

The burden of proof as to answer in application is on the company.

Evidence referred to in a motion for a new trial as contained in a bill of exceptions is not so contained where no bill of exceptions was not signed at the time.

MITCHELL, J.

Sarah S. Hazelett brought suit against the Northwestern Mutual Life Insurance Company, to recover the amount of a policy of

* Opinion filed, January 27, 1886.

insurance issued upon the life of her husband. The policy stipulates that upon due proof of the death of William J. Hazelett the sum of \$3,000 shall within a time limited be paid his wife, Sarah S. Hazelett as beneficiary. Issues were made upon a complaint filed in the court below, and upon trial by a jury, a verdict was returned upon which judgment was entered for \$3,300, the amount of the policy with interest.

The first error assigned is that the court erred in overruling a demurrer to the complaint. The only defect suggested in regard to it is that neither the original nor a copy of the policy is filed and made part thereof, and that a copy of a policy follows in the transcript immediately after the complaint; it is contended, nevertheless that the transcript fails to show the actual filing of a copy. The policy which is thus copied into the transcript conforms in all respects to that described in the complaint, and which it is averred therein "is filed herewith and made a part of this complaint." Within repeated rulings, this is a sufficient identification of the instrument sued on, and shows that it was filed with the complaint, *Whitworth vs. Malcomb*, 82 Ind., 454; *Lentz vs. Martin*, 75 Ind., 228; *Carper vs. Kitt*, 71 Ind., 24, and cases cited. The application was referred to in the complaint in like manner and is likewise copied into the transcript. It was not necessary that a copy of the application should have been filed with the complaint: *Continental Life Ins. Co., vs. Kessler*, 84 Ind., 310; *Penn Mut. Life Ins. Co. vs. Wiler*, 100 Ind., 92.

A demurrer was sustained to the first paragraph of the defendant's answer. This ruling is assigned for error. This answer sets up as a defense that the policy contained an express stipulation that if the assured should ever become intemperate, or so far intemperate as to impair health or induce delirium tremens, the policy should become null and void. It avers that after the policy was delivered the assured did become intemperate to such a degree as to induce delirium tremens. The second clause of the printed conditions upon which the policy was accepted, as therein recited, contains among many other prohibitions in respect of the conduct and occupation of the assured, a prohibition against intemperance, the substance of which is stated in the answer as summarized above. This clause provides that the doing of any or all of the things prohibited therein shall render the policy null and void. The fifth clause of the printed conditions of the policy is as follows:—

Fifth. If the said insured becomes habitually intemperate, or so far intemperate as either to impair health or induce delirium tremens, then in either such case the company may cancel this policy, and thereupon be absolved from all liability upon the same except only the surrender value thereof, computed according to the practice of the company, which surrender value it may pay on the surrender of this policy if applied for in the lifetime of the insured, and within one year from the cancellation of the policy.

In the clause first alluded to, intemperance, to the degree of impairment of health, or of inducing delirium tremens, worked an absolute forfeiture. In the other, the result which was to flow from the same conduct was that the insurance company might cancel the policy, and by that means absolve itself from liability, except for the "surrender value." The first stipulation is found in a printed clause in which are contained numerous other conditions, the violation of any one of which was to render the policy void. The last is a separate clause of the contract, and is complete in itself. It thus appears that two stipulations were incorporated in the policy covering the same subject-matter; the producing that upon certain conditions the policy should become absolutely void, the other that upon precisely the same conditions the insurance company might avoid the policy, and absolve itself from liability to a certain extent. Since both of these conditions cannot stand together, the inquiry is which shall prevail?

While forfeitures are never favored, yet, if upon a reasonable construction, it appears that the parties contracted for a forfeiture upon certain conditions, it only remains for the courts to enforce the contract as the parties have made it. It is neither unlawful nor against public policy for a contract of life insurance to stipulate that upon certain conditions or contingencies the policy shall become void: *Bloom vs. Franklin Life Ins. Co.*, 97 Ind., 478; *Douglass vs. Knickerbocker Life Ins. Co.*, 83 N. Y., 492. A forfeiture will not be enforced, unless it is clearly demanded by established rules governing the construction of written agreements. Where a policy of insurance contains inconsistent or contradictory provisions, it is the rule that the provision most favorable to the assured will be adopted: *Mouler vs. American Life Ins. Co.* 111 U. S., 335; s. c. 4 Sup. Ct. Rep., 466; *National Bank vs. Insurance Co.*, 95 U. S., 673. Courts will construe a contract of insurance liberally, so as to give it effect rather than to make it void. Conditions which create forfeitures will be construed most strongly against the insurer. Only a stern legal necessity will induce such a construction as will nullify the

policy: *Carson vs. Jersey City Insurance Co.*, 43 New Jersey Law, 300; s. c. 39 Amer. Rep., 584; *Franklin Life Ins. Co. vs. Wallace*, 93 Ind., 7; *Bliss on Insurance*, Sec., 385.

In *Burkhard vs. Travelers Ins. Co.*, 102 Penna. St., 262, it was said: "When a party uses an expression of his liability having two meanings, one broader and the other more narrow, and each equally probable, he cannot after an acceptance by the other contracting party set up the narrow construction." The policy before us having been presumably prepared by the company, and containing on its face inconsistent or ambiguous stipulations as to the consequences which should result from intemperance, the meaning most favorable to the assured must be attributed to it. This rule is particularly applicable in a case like this, where a forfeiture is insisted upon. To hold otherwise would be to give a construction to the contract which would enable the insurance company to exercise its option, after having collected premiums, to insist upon a forfeiture or not according to its pleasure. The consequences of intemperance were made the subject of a particular, specific, and separate stipulation in which no other subject is mentioned; and, according to well established rules of construction, when such is the case, the separate specific stipulation is to be preferred over a general stipulation inconsistent therewith. As there was no averment in the answer that the insurance company had absolved itself from liability by canceling the policy according to the terms of the fifth stipulation contained therein, the demurrer to the first paragraph of the answer was correctly sustained. The demurrer was substantially in the form of that considered in the cases of *Rennick vs. Chandler*, 59 Ind., 354, and *State vs. Stone*, 75 Ind., 236, and is subject to the same criticisms as were then made. It sufficiently appears, however, that it was addressed to each paragraph of the answer separately: *Mitchell vs. Stinson*, 80 Ind., 234. It is, therefore, not a joint demurrer, as contended, to all of the several paragraphs of answer.

It is assigned for error that the court erred in overruling the demurrer to the second and third paragraphs of reply. Both of these replies are directed to the fourth, fifth, sixth, and seventh paragraphs of answer. Each of these paragraphs of answer refers to a stipulation which is found in the policy, to the effect that, whether sane or insane, if the assured shall die by his own hand, the policy shall be void.

The fourth paragraph of answer, which fairly represents all the others, charges in substance that after the delivery of the policy

the insured voluntarily entered upon a course of dissipation, by an excessive use of spirituous and malt liquors as a beverage, whereby his mental and physical powers were enfeebled, and he was rendered less able to understand the nature and probable result of his own acts, and that while in such enfeebled condition, and without fully knowing the consequences of his acts, he procured and swallowed an excessive draught of alcoholic liquor, from the effects of which he died shortly thereafter. The replies set up substantially that the assured, prior to his death, from causes over which he had no control, became physically and mentally weak and diseased, and that he resorted to the use of spirituous liquors as a means of restoring his health; that during his physical and mental debility he accidentally, without any intention of destroying his life, took an overdose of whisky, from the effects of which he became sick and died; that the results which followed the use of the whisky were not expected nor intended by the assured; that, by reason of his weak and debilitated condition, the whisky had an unusual, accidental, and unexpected effect upon the assured, causing him to sicken and die, when no such result was expected or intended.

On behalf of the appellant it is contended that, because it is not denied that the assured voluntarily entered upon a course of dissipation as charged in the answer, and because it is not denied that his weak and enfeebled condition was the result of such dissipation, the replies do not avoid the answer, notwithstanding the averments therein contained that the effect produced by the draught of whisky was unexpected, unintentional, and accidental.

It should be stated that it is averred in the second paragraph of the reply that the assured did not use intoxicating liquors so as to impair his strength or destroy his health. In the third paragraph the averment is that he became physically and mentally diseased and weak from causes over which he had no control.

Stipulations of the character here under consideration have been the subject of much discussion, and of frequent judicial construction. It seems to be settled that such a clause in a policy of life insurance is a protection to the insurer, in case of voluntary and intentional self-destruction by the assured, whether sane or insane: *Bigelow vs. Berkshire Life Ins. Co.*, 93 U. S., 284; *De Gogorza vs. Knickerbocker Life Ins. Co.*, 65 N. Y., 232; *Pierce vs. Travelers Life Ins. Co.*, 34 Wis., 384. Such a clause has, however, no application to a case in which death resulted by accident, or without intention or expectation, even though it was caused by the hand of the assured.

Death resulting from accident, or from an act which, at the time it was entered upon or engaged in, was not expected or intended to produce that result, cannot be said to be within the meaning of the policy: *Penfold vs. Universal Life Ins. Co.*, 85 N. Y., 317; s. c., 39 Am. Rep. 660; *Pierce vs. Travelers Insurance Co.*, 34 Wis. 384; *Burkhard vs. Travelers Ins. Co.*, 192 Pa. St., 262.

The pleadings under consideration involve no question insanity. It is not averred that the assured was insane. From causes over which he had no control, a state of mental and physical weakness resulted; and while in that state he took an overdraught of whisky, without any expectation or intention of destroying his life. Death was therefore the result of an accident, and the policy is not avoided. The demurrer to the replies was properly overruled.

It is next contended that the court erred in overruling the appellant's motion for a new trial, and under this assignment it is insisted that the verdict is not sustained by sufficient evidence. Without entering upon a discussion of the evidence, we think it does not establish the fact that William J. Hazelett intentionally destroyed his own life, nor does it so clearly sustain any of the defenses on which the appellant relied as that it can be said the finding of the jury is not well supported by the evidence.

The giving and refusing to give certain instructions were assigned as ground for a new trial. The objections which are stated as pertaining to the instructions are, in the main, of such a general character that we are led to conclude that no specific error was apparent to the appellant's learned counsel. Some of those upon which error is predicated were not assigned as grounds for a new trial in the motion filed for that purpose, and are for that reason not before us. Where the legal proposition involved in an instruction is not in some way stated in the brief of counsel, and nothing more is done than to indicate to the court the page of a voluminous record on which it may be found, with some general observations concerning it, the objections to it will not be considered, *La Rose vs. Logansport etc. Bank*, 102 Ind., 332; s. c. 1 N. E. Rep., 805.

Such of the instructions as relate to the clause in the policy which provides that if the assured, whether sane or insane, shall die by his own hand, have been sufficiently considered in what has been already said on that subject in respect of the pleadings. The law of the case in that regard was correctly interpreted to the jury, in conformity with what has been expressed heretofore in this opinion.

Some of the instructions prayed for by the appellant proposed, as

the law applicable to one feature of the case, that if the act which actually resulted in the death of the assured was voluntarily performed, and the probable result of the act was such that, owing to his enfeebled condition, death was likely to ensue, then the policy was avoided. We cannot assent that this is a correct statement of the law as applied to the policy under consideration. As already stated, the clause alluded to does not exonerate the insurance company from liability unless the act which caused the death of the assured when performed, was intended to have that effect. If it were otherwise, it might happen that any one in the delirium of sickness, who should do an act with the intent, so far as he had any intent, to restore himself to health, and which under other circumstances he might know was highly dangerous, would nevertheless, if death should unexpectedly ensue, fall under the contemplation of having committed suicide, or died by his own hand. Thousands of persons have doubtless prematurely come to their death by taking a potion which aggravated, when the hope or purpose was that it might allay, a malady which distracted them. Possibly a physician could have told them, or, in the absence of the malady, they might have known themselves, that it was highly dangerous, when in an enfeebled condition, to take it. The instructions prayed for on this subject were properly refused.

Other instructions presented by the appellant requested the court to tell the jury that certain answers to questions contained in the application for insurance constituted warranties, and that the burden of proving the truth of such answers was on the plaintiff. In the case of *John Hancock Mut. Life Ins. Co. vs. Daly*, 65 Ind., 6, this point was considered, and it was there held, in accord with the general rule, that the burden was, under like circumstances, upon the defendant: *Insurance Co. vs. Gridley*, 100 U. S., 614; *Piedmont, etc. Ins. Co. vs. Ewing*, 92 U. S., 377; *Swick vs. Home Ins. Co.*, 2 Dill, 160.

As causes for a new trial, it is assigned that the court erred in admitting and excluding certain evidence admitted and excluded. None of the evidence thus admitted or excluded is identified in the motion for a new trial with sufficient certainty to present any question. The motion for a new trial concludes with a statement that all the evidence improperly admitted or excluded is more particularly set out in a bill of exceptions containing the evidence. The motion for a new trial was filed and overruled on the 5th day of October, 1883, and the bill of exceptions containing the evidence was

not signed by the judge until November 3d, 1883. There was therefore no bill of exceptions such as that referred to in the motion on file at the time the motion for a new trial was overruled: *Harvey vs. Huston*, 94 Ind., 527; *Snyder vs. Riggs*, 92 Ind., 336; *Miller vs. Shriner*, 87 Ind., 141; *Burnes vs. Thompson*, 91 Ind., 146; *Radway vs. Waddell*, 95 Ind., 170.

Having thus considered all questions which the record presents, and finding no error, the judgment is affirmed with costs.

Judgment affirmed.

COURT OF APPEALS OF KENTUCKY.

Appeal from Jefferson Circuit Court.

IMPERIAL FIRE INS. CO., ETC.,

vs.

JOHN KIERNAN;

NORTHERN INS. CO.

vs.

SAME.*

Where the policy describes the house insured as "occupied as a family residence," *Held*, a representation or at most a warranty in presenti, and not a continuing warranty that the house should remain so occupied.

The jury having returned a special verdict and each party claiming judgment thereon, the court reserved its decision for four months and then decided for appellee; *Held*, appellant could not move for a new trial at any time in three days thereafter, but should have moved for it in three days after the return of the verdict.

HARGIS & EASTIN and F. T. FOX, JR., *for Appellant.*WILLIAM LINDSAY and S. F. J. TRABUE, *for Appellee.*

HOLT, J.

The policy of insurance issued by the appellants to the appellee, John Kiernan, was for one year from January 15, 1881; and described the property as "his two-story, brick, shingle-roof building, occupied as a family residence."

A subsequent clause provided for its becoming void in these words: "Or shall be or become vacant or unoccupied without notice to and consent of these companies in writing."

* Opinion filed, December 17, 1885.—From *Kentucky Law Reporter*.

When insured it was occupied as a family residence by a tenant of the appellee, and the character of the house was never changed; but on November 26, 1881, he, together with his family, moved out of it, although his lease would not have expired until in March following; and on December 5, 1881, it was burnt.

When the tenant removed the appellee, failing to obtain another tenant immediately, got a man to stay in one room of the house, which was furnished for the purpose, and who ate and slept there, having access to the entire building for the purpose of caring for and watching it; and he was so doing when it was destroyed.

The policy provided that if the parties to it differed as to the amount of any loss it should be fixed by arbitrators, whose written award should be binding upon the parties as to the amount, but should not determine the liability of the appellants therefor.

After proper proof had been made of the loss the parties by written contract submitted the question of amount to arbitrators, who, by an award in writing, fixed it at \$5,602.32. The appellants failing to pay the insurance, which was \$2,000 by each company, the appellant brought these actions upon the policy, alleging that his loss was \$10,000, and asking judgment in each action for the \$2,000.

Subsequently he, by an amended petition, set up the agreement to arbitrate and the award. The appellants seem at the outset to have mainly relied upon alleged actual fraud upon the appellee's part; but the testimony disclosing his good faith, the defense mainly urged by them at last in the lower court was, that the policy became inoperative when the house ceased to be occupied by a family; and that the words "occupied as a family residence" constituted a continuing warranty that the house should be occupied by a family during the entire time covered by the policy.

If this be so, however, then the subsequent provision that the policy should become void if the house should "be or become vacant or unoccupied" was needless. These words mean without an occupant; and if the words used in giving the description of the property, "occupied as a family residence," imply an undertaking that the house should be occupied by a family during the term of insurance, then we must suppose that the insurers used the subsequent words unnecessarily.

Effect should be given to both, if they can be reconciled; and both be considered in construing the contract; but forfeitures are not favored; and if the language be of doubtful import, it should be construed most strongly against the insurer.

If under our law the words "occupied as a family residence" could be treated as a warranty, we think, in view of the subsequent language, it could only be held to be one as to the use of the house in presenti. But our statute provides that "all statements or descriptions in any application for, or policy of insurance shall be deemed and held representations and not warranties, nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy." Gen. Stats., p. 968.

The parties must be considered as having contracted with reference to this statute, which was upheld in the case of the Germania Insurance Co. vs. Rudwig, etc., 3 Ky. Law Rep., 712; 80 Ky. Rep., 223; and the statement in the policy, "occupied as a family residence," must be regarded as but a representation as to its then use; and the subsequent words as but an undertaking by the insured that the house should not be without an occupant during the time covered by the policy.

The motion of the appellants for a peremptory instruction in their behalf in the nature of a nonsuit was based upon a counter view as to the proper construction of the terms of the policy.

It was equivalent to a demurrer to the appellee's evidence; it presented a legal question only; and for the reasons *supra* was properly overruled.

Two questions remain to be disposed of; first, was there, within the law, any motion for a new trial?

If not we cannot consider the correctness of the special verdict.

Second, if none, then did the special verdict authorize the judgment?

No verdict save a special one was asked, directed, or returned; and it was rendered on January 13, 1883. The following is the substance of the facts found:—

1. That the house was covered by the policy.
2. That the house, or a portion of it, was occupied up to the time of the fire after the tenant moved out of it.
3. Henry Suter, a negro boy, occupied the house and had access to all parts of it.
4. Suter was employed to occupy it and take charge of it.
5. Tenant moved out before his term expired.

6. He did not move out with plaintiff's consent.
7. Plaintiff attempted in good faith to get another tenant.
8. The award of the arbitrators was \$5,602.30.
- A. Suter occupied a room attached to main house.
- B. Suter was not married.
- C. Suter occupied said room in charge of the house.
- D. Suter occupied it as a family residence.
- E. Plaintiff gave no notice to defendant that the house was vacant or unoccupied.
- F. Defendant did not consent to said vacancy.
- G. There were household goods and furniture in it belonging to plaintiff or to the tenant when tenant left it, or at the time of the fire.

Closing as follows:—

"We, the jury, find as above. W. C. Smith, Foreman."

Neither side objected to them; but each moved for judgment in his and its favor, respectively, upon them.

The court took time and rendered a judgment for the appellee on May 7, 1883, for the amount of the policy. On May 8, 1883, or nearly four months after the rendition of the verdict, the appellants filed grounds and entered a motion for a new trial. The appellee objected, and the motion was overruled.

Section 340 of the Civil Code provides: "A new trial is a re-examination in the same court of an issue of fact after a verdict by a jury or a decision by the court."

The expression "decision by the court" manifestly refers to a case where the facts as well as the law are submitted to the judgment of the court.

Section 342 of the Code says:—

"The application for a new trial must be made at the term in which the verdict or decision is rendered; and except for the cause mentioned in section 340, subsection 7 (which did not exist in this case) shall be within three days after the verdict or decision is rendered, unless unavoidably prevented."

A motion for a new trial questions the finding of fact alone, whether by judge or jury. If a verdict is complained of as unsupported by the evidence, then it is assailed for the direct error of the jury; but if the complaint be that the court committed an error, for instance in giving instructions, or in the admission of evidence, yet the verdict is assailed as a consequential error. A motion for a new trial does not question the legal conclusion which the court may reach in rendering a judgment. If it be erroneous in not conforming to the verdict or the finding of facts, a motion for a new trial is not the proper mode of correction. It may be reviewed without such a motion, and by merely asking the court to correct it; and the correction would not affect the verdict. A judgment is usually rendered when the verdict is returned into court; but need not necessarily be, even in the case of a general one. If the court is in doubt as to the proper judgment to be rendered it may wait to be advised. Even if it tries the facts, it may enter its decision as to them, and take time as to the law of the case. A party need not delay making his motion for new trial until the judgment is entered. If the finding of fact be wrong it is important that the court's attention should at once be called to it; and therefore the time within which it may be done has been limited to three days. It is urged, however, that this is requiring a party to jump in the dark; to act without knowing what the court may do. It is a sufficient response to this to say *lex sua scripta est*; but we see no good reason why a party should be allowed to speculate on what the court may do; and if he does, why should he not be required, as in numberless other cases, to risk his judgment?

Suppose that a party against whom a general verdict has been returned moves for a judgment in his favor *non obstante verdicto*; the court takes time upon the question and finally overrules the motion and renders a judgment upon the verdict. In such a case can the plaintiff move for a new trial when more than three days have elapsed from the rendition of the verdict? We think not. The delay by the court in entering the legal conclusion cannot extend the statutory period fixed for questioning the finding of fact. The rule upon this point is the same whether the verdict be a general or a special one. In the latter case it is final as to the facts.

We have been unable to find but one case upon this question.

By the California Code a notice of a motion for a new trial must be given within two days from the termination of the trial.

In the case of *Allen vs. Hill*, 16 Cal., 113, a special verdict alone

was rendered upon January 14, 1860. Judgment upon it was reserved until January 20, 1860, and the notice of the motion for a new trial given upon the next day.

It was urged that it was not required that the notice should be given until the completion of the trial; and that it was not complete until the judgment was rendered upon the special verdict; but the court held otherwise, saying:—

“It is urged that as the verdict was special it was necessary to invoke the action of the court before a judgment could be entered upon it, and that therefore the trial itself did not in contemplation of law terminate until the judgment was rendered. We cannot assent to this view. The facts were settled by the verdict, and it only remained for the court to pronounce the conclusion of the law upon the facts found. If the court erred in this respect the error is a proper subject of review, and a motion for a new trial was unnecessary. If the verdict was not satisfactory the right to correct it did not depend upon the judgment, and the steps for that purpose should have been taken within the time limited by the statute.”

In this case no question arises as to when the trial terminated, because under our practice the period within which a motion for a new trial must be made dates from the rendition of the verdict.

It is said, however, that there was no verdict upon which a judgment could be entered for the appellee; that it found no sum for which one could be rendered; that it should have found the facts and declared that if upon them the appellee was entitled to recover, then that he was entitled to a certain sum, naming it, or that his damages were so much.

A special verdict at common law was one by which the facts of the case were put upon the record; and section 326 of our Code defines it as “the finding of facts by a jury as shown in their answers to questions submitted to them in writing.”

It is true that section 327 of the Code, in speaking of it, says that “on such finding the jury shall return a special verdict only;” but when the two sections are considered together it is manifest that this only means that when such a verdict is ordered it only shall be returned.

The petitions allege that the loss or damage was \$10,000; the award fixed it at \$5,602.30, the appellants admitting in their pleadings that the question as to the amount of it was by agreement left to arbitrators, but denying that they found the award of \$5,602.30—which issue was, however, settled by the special verdict; the prayer

of the petitions is for a judgment for the amount of the insurance, which was less than the amount of the award.

It is earnestly urged that if the judgment was based upon the special verdict, that then it should have been for the amount of the award, instead of the amount of the policy; that the lower court got the amount of the judgment from his own mind, instead of the verdict, beyond which he could not go to get the facts; and that it is the duty of a court in such a case to act upon the verdict as it is, and not as it should be.

True it is that in such a case it is the province of the jury to find the facts, and the court to declare the law; and the damages to be recovered must be fixed by the jury, unless only a question of legal construction or a legal issue is involved.

The jury, however, only find facts which are in issue. Here the parties agreed that in the event of a loss the appellees should pay not exceeding a certain sum, although the actual damage might be much more.

If the parties had by contract fixed the amount of the damages, and the appellee had alleged it in his petition, then it would govern, and no finding as to it would have been necessary. It would not have been in issue. Did they not do what was equivalent to this when they by agreement submitted the question to arbitrators?

The special verdict found that the parties had by agreement through arbitrators fixed the entire loss, and it found the amount so fixed. This was before the court, together with the agreement of the parties, binding the insurer to pay a certain sum, which was less than the award.

Under these circumstances the question as to the amount for which the judgment should be rendered was merely a legal one and involved no issue of fact.

Judgment affirmed

SUPREME COURT OF PENNSYLVANIA.

Error to Common Pleas No. 3 of Philadelphia County.

AMERICAN LIFE INS. CO.*

vs.

McADEN.

A policy of insurance was issued by a company to A on the life of her husband. She paid the premiums on the same in quarterly payments for ten years, when the company refused to receive a certain premium and declared the policy void, on the ground that said premium was not tendered for several days after the time stipulated in the policy, and that the latter had, therefore, become forfeit to the company. Upon the company's refusal to return her premiums, A brought assumpsit against them, on the rescission of the policy, to recover premiums paid on a count for money had and received. At the trial A offered to read the policy in evidence, but the court excluded it, upon objection by defendants that it was an instrument under seal and the action was assumpsit. A verdict was rendered for the plaintiff and judgment entered thereon. Whereupon the company took a writ of error. *Held*, that the judgment should be affirmed.

Assumpsit for money had and received was the proper form of action.

The action was not on the policy, but was in direct disaffirmance thereof. It was error, therefore, to refuse to admit it in evidence; but this having been done at the instance of the defendants, they could not complain.

If the policy contained a clause according to which, by reason of the non-payment of the premium on or before the day it was tendered, the policy became forfeited, A could not recover. But this was not shown, and the proof of it depended, in the first instance at least, on the proper construction of the policy, which the defendants would neither offer in evidence themselves nor allow the plaintiff to offer. As the cause was presented to the court, therefore, defendants declared the policy void without any warrant, and having received A's money under such circumstances and refused to return it on demand, she was entitled to recover it in her action of assumpsit.

It was immaterial that the payment of the premiums was voluntary, upon a valid obligation of A's. The action was not founded on fraud or failure

* Opinion filed, October 5, 1886.—*From Eastern Reporter.*

of the original contract, but on a rescission of it, by the defendant's refusal to perform.

There was no error in allowing interest from the date of A's demand for the return of her premiums.

Assumpsit by Rufus T. McAden and Mary F. McAden, in the right of said Mary F. McAden, against the American Life Insurance Company, upon a rescission of a policy of insurance to recover the premiums paid. The opinion states the facts.

HENRY HAZELHURST, *for Plaintiff in Error.*

GEORGE H. EARLE, JR., LEWIN BARRINGER, and RICHARD P. WHITE, *for Defendants in Error.*

CLARK, J.

The evidence shows that in May, 1869, a policy of life insurance was issued by the defendant, the American Life Insurance Company, to the plaintiff, Mary F. McAden, in the sum of \$20,000, upon the life of her husband, Rufus Y. McAden, of Charlotte, North Carolina; that the plaintiff paid premiums on this policy in quarterly payments of \$104.14 each, from its date until in August, 1879, when the company refused to accept the premium then tendered, declaring that the policy by its terms had become forfeit to the company, the premium mentioned not having been paid or tendered within the time stipulated, but one or two days later. This action of assumpsit was thereupon brought, not upon the contract contained in the policy, but as upon a rescission of it to recover the premiums paid, upon a count for money had and received by the defendant to the use of the plaintiff.

The policy was produced at the trial, and the plaintiffs offered to read it in evidence, but upon the objection of the defendants' counsel that it was an instrument under seal and the action assumpsit, the court excluded it. This ruling of the court was, we think, erroneous, but the defendant cannot complain, as it was made at his instance. The action, it is plain, is not founded on the policy, for if the policy be in force, there can in the nature of the case be no recovery upon the count for money had and received. The suit is in direct disaffirmance of the contract and cannot, therefore, be said to be founded upon it.

Assumpsit, for money had and received is frequently brought to recover back a deposit, or money paid upon an agreement which the defendant omits or refuses to perform; and on a single count in the common form, various sums received at different times may

be recovered: 1 Chitty Pl., 353, 356. When, for example, a person purchases land and pays part of the purchase-money, and the seller does not and will not complete the engagement so that the contract is totally unexecuted, he, the purchaser, may either affirm the agreement by bringing an action for non-performance of it, or he may elect to disaffirm it, ab initio, and bring an action for money had and received to his use: Sugden on Vendors. Or, where two persons enter into a contract for service, and after part performance by one the other denies its existence, and gives notice of his intention to disregard it, the party not in default may at his option perform fully and enforce the contract, or consider it at an end and recover for part performance, upon a quantum meruit: *Moorhead vs. Fry*, 24 Penn. St., 37.

In *Feay vs. Decamp*, 15 Serg. & Rawle, 227, there was an agreement under seal for the sale of land, with possession delivered and a large part of the money paid, but not to the extent the contract required; the owner resumed the possession and declared the contract at an end; held, to be a disaffirmance, and that the vendee might, in an action of assumpsit, recover back the money paid on a count for money had and received. The doctrine as to the distinction to be drawn between a suit on the contract and a suit grounded upon a rescission of it is thus plainly stated in *Smethurst vs. Woolston*, 5 W. & S., 109: "But this distinction which pervades all the authorities governs the whole case; for the purchaser may declare specially for the breach of the contract, or simply for money had and received to recover back the deposit, if any be made, or the purchase-money, if it be paid; or he may join both causes of action in the same declaration. And when this is done, it is granted that, under the money count, the money advanced may be recovered back; or where a specific article has been given in satisfaction, the purchaser may, when default is made, elect to consider the contract at an end and recover the article itself, or its value, from the vendor. But, on the other hand, where the purchaser declares specially for breach of the contract, and thereby affirms it, the only rule of damages is the value of the article at or about the time it is to be delivered."

The same principle is applied in *Wilkinson vs. Ferree*, 24 Penn. St., 190, and *Muller vs. Phillips*, 31 id., 218.

In all such cases, the contract, although under seal, is rightly received in evidence, to exhibit the transaction as it previously existed, to determine the resulting rights of the parties, and in some

cases, perhaps, to aid in the assessment of the damages: *Mehaffy vs. Share*, 2 P. & W., 361; *Carrier vs. Dilworth*, 59 Penn. St., 406.

If, however, the contract has been in part performed, the plaintiff having received some substantial benefit therefrom, and if, upon a verdict in his favor, the parties cannot be placed in statu quo, the count for money had and received, in general, is not maintainable: *Chitty Pl.*, 355: The plaintiff must show that he has equity and good conscience on his side, or he cannot recover.

In the case at bar, the rights of the parties, under the contract of insurance, had attached, but the plaintiffs had never received any actual benefit from it. They may, in some sense perhaps, be said to have enjoyed the protection which the policy afforded in the event of the husband's death, but as that event did not occur, the policy had as yet been of no appreciable actual advantage to the plaintiff, and no real disadvantage to the defendant. The parties, for anything that appears upon the plaintiff's recovery, are placed precisely in the same situation they were in before the contract was made; for, although the company carried the risk, and the plaintiff, *Mary F. McAden*, at all times during the continuance of the contract, upon the happening of the event provided against, was entitled to the indemnity it secured, yet the company has paid nothing, and the plaintiffs have received nothing. As in the case of any other contract the parties were each entitled, during its continuance, according to its terms.

The policy, when made, was admittedly valid; the premiums which were paid were voluntarily paid upon that policy; the risk had been running for ten years; the obligations of the contract were long since in force, on both sides, and it is clear that the plaintiffs could not on their own mere motion rescind it, so as to recover back the premiums paid; but if after receiving these several premiums the company, without right, refuse to receive further premiums as they mature, deny their obligation, and declare the contract at an end, the plaintiff, we think, may take the defendants at their word, treat the contract as rescinded, and recover back the premiums paid, as so much money had and received for their use. Rescission or avoidance, properly so-called, annihilates the contract, and puts the parties in the same position as if it had never existed; and notice that a party will not perform his contract has the same effect as a breach: *Ballou vs. Billings*, 136 Mass., 309. It is of no consequence that the payment of the premiums was voluntary, upon a valid obligation of the plaintiff to discharge a debt which the plaintiff owed, and which

the defendant had a right to receive; the action is not founded in any fraud or failure in the original contract, but on a rescission of it through the subsequent refusal of the defendant to perform it.

It is clearly shown, indeed it is admitted, that the premium due in August, 1869, was tendered to the company, and was refused upon the ground that the company was not then bound to receive it, and that the policy, according to some alleged express stipulation it contained, respecting the payment of the premiums, was forfeited and void. The president of the company denied all liability on the policy, and declared the contract at an end. If the reasons assigned by the president were valid and true, the refusal to receive the premium was right; if the contract was in fact forfeited and void, there was no contract remaining to rescind, and if there was no rescission there could be no recovery for money had and received. But there was no proof whatever of a forfeiture of the policy; it was alleged that the contract contained a clause, according to which, by reason of the non-payment of the premium due in August, 1879, on or before the exact day designated for payment thereof, a forfeiture ensued; whether this was so or not depended, in the first instance at least, upon the proper reading and construction of the policy itself, which the defendant would not allow the plaintiffs to offer in evidence, nor would they offer it themselves.

The policy is, therefore, not before us; we do not know what it provides; if it contains any such clause, it should have been given in evidence. As the case is now presented to us, the company would appear to have declared the lapse of the policy, without any warrant whatever, and without cause, and if the defendants received the plaintiff's money, and under such circumstances, upon demand, refused to return it, we think it may be recovered back in an action of assumpsit: *May Ins.*, 429; *Siepel vs. International Ins. Co.*, 84 Penn. St., 47.

The case of *McKee vs. Phoenix Insurance Co.*, 28 Mo., 383, is, in all respects, similar in principle to the case under consideration; there, a wife insured the life of her husband, and after making several payments obtained a divorce; other payments were afterward made, when the insurer refused to receive a semi-annual installment, tendered when due; in an action for money had and received, it was held, that the decree of divorce did not authorize a forfeiture of the policy, and that "if the defendant wrongfully determined the contract, by refusing to receive a premium when it was due, then

the plaintiff had a right to treat the policy as at an end and to recover all the money she had paid under it."

In some cases, perhaps, the defendant ought to refund the principle merely; and in others he ought *ex æquo et bono* to refund the principal with interest; each case depends upon the justice and equity arising out of its peculiar circumstances. In this case, however, interest was allowed for the date of the demand only, and certainly the defendant cannot complain of that.

The judgment is affirmed.

Trunkey, J., dissents.

SUPREME COURT OF MICHIGAN.

Cross Appeals from St. Clair.

KNIGHTS OF HONOR }

vs. }

NAIRN.* }

The beneficiary in a policy of life insurance issued by the Knights of Honor can be changed only in the manner prescribed by the constitution of that society,—by filling the necessary blank on back of policy, attestation by the “reporter,” and surrender of the policy to the lodge, and the issuance of a new certificate.

FREDERICK T. SIBLEY, *for Complainant and Appellant.*AVERY BROS. and JAMES H. BREWSTER, *for Defendant and Appellant.*

CAMPELL, C. J.

Complainant filed a bill of interpleader to settle the contending claims of the two defendants to a sum of \$2,000 under a member's benefit certificate issued to Harry Traver, now deceased, who was a member of one of the subordinate lodges of the association represented by complainant. It appears from the record that the order of which complainant is a corporate representative, or various associations connected with it, became, at different times, incorporated in different States. It also appears that there is a general association to which the smaller bodies are said to conform, having local lodges, incorporated and unincorporated. Just how far the special corporations in different States govern those elsewhere not incorporated does not fully appear, and is not material in the present

* Opinion filed, February 3, 1886.—From *N. W. Reporter*.

case. We have no judicial knowledge beyond the record, and need not inquire.

In the present case, Traver appears to have been a member of a lodge at Port Huron, in this State, and the complainant, which is the body issuing the benefit certificate, and bound to pay it, is a corporation organized under the laws of Missouri. It is therefore, in all its contract relations, subject to the conditions imposed upon its corporate powers by those laws, and no rules or conditions can be lawfully imposed, contrary to those laws, upon its corporate action by any private association. It can make no contracts forbidden by the laws of Missouri to such corporations; and, while the action of the unincorporated supreme lodge may be of more or less service in construing ambiguous arrangements not forbidden, it cannot in any way supersede the statutes. The benefit certificate, which is dated July 16, 1881, after reciting membership of Traver, and some other similar matters, and some conditions, concludes as follows: "The said supreme lodge hereby agrees to pay out of the widows and orphans' benefit fund, to his sister, Mrs. F. T. Richardson, the sum of two thousand dollars, in accordance with and under the laws governing this order, upon satisfactory evidence of the death of said member, and the surrender of this certificate: provided, that this certificate shall not have been surrendered by said member or canceled at his request, and another certificate have been issued in accordance with the laws of this order." On the back of this certificate was a printed form: "I hereby surrender to the Supreme Lodge, Knights of Honor, the within benefit certificate, and direct that a new one be issued to me, payable to ———, [signed]——— Attest:——— [Lodge Seal.] ——— Reporter." Upon the certificate in controversy this blank was dated March 25, 1884, signed by Harry Traver, made payable to "George K. Nairn, in trust," but not signed or attested by the lodge "reporter," or by any one.

Defendant Nairn claims that by virtue of this indorsement the fund belongs to him. Defendant Mrs. Richardson claims that nothing has been legally done to divest her of the benefits promised to her by the certificate. Nairn claims that Traver was an army comrade and intimate friend, who had lived at his house several years, and became hopelessly ill from some injury in the early part of 1884, which interfered with his doing any considerable share of business; and in October, 1884, he went to Ypsilanti for medical treatment, where he was under the care of an aunt and other near relatives and family connections, one of whom was a physician. He died at

Ypsilanti in December, 1884. Nairn testifies that, while going to Ypsilanti, Traver told him he had placed a transfer of the certificate, with other papers, in a envelope which he had left in a bureau drawer in his room at Nairn's, and wished him to do according to the instructions which he would find there. It does not appear very clearly when Nairn first looked at this envelope, but it was sealed, and contained on the outside, in black ink, "H. Traver;" and in blue pencil mark, "For Geo. Nairn, in case of my death." After Traver's death, it was opened by Nairn, in presence of some of Traver's relatives, and it then contained the certificate indorsed, as before stated, as of March 25, 1884, and a letter of the same date, as follows:—

"PORT HURON, March 25, 1884.

"Reporter of Integrity Lodge, Knights of Honor—SIR: I desire to have the beneficiary in my certificate of membership changed from Mrs. F. T. Richardson to George K. Nairn, in trust; and in the event of my death two thousand dollars to be paid to him.

HARRY TRAVER."

There was also a letter in blue pencil, dated June 24, 1884, directed to Nairn, and indorsed, "Geo. K. Nairn, in case of my death," the purport of which was a request to have his affairs straightened, pay a list of debts inclosed of about \$359, and funeral expenses, and apply balance as directed in memoranda. The remainder of the letter explained his business matters and some other things. There was also a life insurance policy for \$500 on the life of Mrs. Richardson, which he requested to have kept for her son. Also a letter dated October 15, 1884 (which was the date of his going to Ypsilanti), addressed jointly to his sister and aunt, requesting them, in case of his death, to confer and consult with Nairn, and rely on him implicitly, saying: "He has been to me through twenty years or more as a brother, and is as dear to me as one." There was no memorandum in regard to what were the terms of Nairn's trust in the fund, but Nairn says that on the way to Ypsilanti, Traver told him to take what was reasonably due him, and keep the rest in trust for his little girl. He also says that from the spring of 1884, he paid Traver's lodge dues and assessments at his desire, but never knew that the certificate had been assigned for his benefit till October, as before mentioned.

It is not claimed on either side that this certificate belonged to Traver as a part of his estate. It is admitted on both sides that he had a power of appointment to change the beneficiary. It is also clear that the beneficiary named in the certificate must take the fund,

unless there has been a valid appointment in favor of Nairn. It is claimed, however, that there are two objections to Nairn's claim: First, that he is not such a person as could receive a benefit under the rules of the corporation; and, second, that no appointment ever became operative. The circuit court for the county of St. Clair ordered the money to be paid to Nairn. Mrs. Richardson appeals on her own behalf. The complainant appeals, claiming that certain provisions of the decree are injurious, as changing the conditions on which complainant can be bound.

The constitution of the order, as last adopted in May, 1884, is very explicit that benefits are to be paid, on behalf of a member, "to such member or members of his family, or person or persons dependent on him, as he may direct and designate by name," etc. The change of beneficiaries was to be made by a member, "while in good standing," surrendering his certificate, and receiving a new one payable as he shall have directed; "said surrender and direction to be made on the back of the benefit certificate surrendered, signed by the member, and attested by the reporter under seal of the lodge." Const., art. 9, § 5. It appears that under a Kentucky charter, and under the constitution as it stood previous to 1884, the benefits could be made payable to his family, or as the member should direct. This, apparently, would have made Nairn a competent beneficiary, if we can regard these constitutions as controlling the contract. But this benefit is payable by a corporation of the State of Missouri, and the laws of that State very clearly and expressly forbid corporations of this sort from paying benefits to any but the member's family or dependents: Rev. St. Mo., p. 179, § 972. This prohibition is strengthened by some further provisions making it unlawful to issue policies of life insurance, or for the benefit of the members themselves in any shape: Section 973. The restrictions imposed by the laws of Missouri cannot be abrogated or changed by the corporation, and it cannot subject itself to any outside control which will override the laws of its organization as a corporate body.

The intent of the prohibition is clearly to shut out all persons who are not actual relatives, or standing in place of relatives in some permanent way, or in some actual dependence on the member. While the relations between Traver and Nairn were very intimate, they do not fairly come within the designation of family relations. If there was any dependence, Traver, and not Nairn, was the dependent person. But, taking Nairn's own answer and testimony together, it is shown that he expected, under the alleged arrange-

ment with Traver, to apply this fund, not only to the payment of other debts, but also to payment to himself as a creditor, leaving such surplus as he chose to leave to one of his own children. The purpose of Traver thus indicated was not to provide a benefaction to a member of his family, or person dependent, but to use the fund to pay debts,—a purpose which is honest, but which is entirely foreign to the benevolent objects of the association, which exclude the member from appropriating the fund to his individual purposes.

The other objection, however, is one which cannot be surmounted. The written contract, so far as it goes, is the measure of the rights of all parties. By the express terms of that certificate, it is provided that Mrs. Richardson shall have the money unless the certificate is surrendered and canceled and a new one issued; and the form of surrender printed on the back conforms precisely to the clause also inserted in the constitution, requiring every surrender and new direction to be signed by the member, and attested by the reporter under the lodge seal, he being the officer into whose hands it must be placed for transmission to the home office for re-issue. Under this arrangement the purpose is evident that the corporation shall always be in written contract relations with a member who is alive and in good standing, which will show them the identity of the beneficiary to whom they are liable. It is possible—and we need not consider under what circumstances—that when a member has executed and delivered to the reporter his attested surrender, in favor of a competent beneficiary, his death, before a new certificate is rendered, may leave his power of designation so far executed as to enable a court of equity to relieve against the accident. But in the present case the facts show conclusively that Traver did not mean to have any surrender made until after his death. Nairn was not authorized to open the envelope or handle any of the papers while Traver lived, and Traver retained complete control of them. No one was authorized, while he lived, to take any steps to complete a surrender. The attestation of the reporter was not a mere ceremony. In this very case, issue is made on the voluntary character and legal validity of Traver's alleged execution of the various papers. We are not disposed to consider that view of the case. But it is plain that the formality of appearing personally before an officer of the corporation or its lodges, and having the execution seen and attested by such an officer, would be a valuable guard against fraud and forgery, which was not provided for without some intention. In our opinion, Traver never surrendered this certificate, and never

attempted to surrender it, within either the letter or the spirit of its conditions, and the right of Mrs. Richardson remains as originally provided for.

We do not, in reversing the decree, mean to impugn any one's integrity. We dispose of the case purely on legal grounds, which leave us, in our opinion, no choice in the matter. The contract is one which the parties made on their own conditions, and every one is bound by them.

We do not, regard the complainant's appeal as within the rules of interpleader, and, while we shall not disturb the allowance of \$50 made below, we can grant no further costs to it on appeal. The learned argument of the distinguished counsel representing it was instructive, but bore entirely in favor of one of the two defendants.

Mrs. Richardson is entitled to costs of both courts against Nairn, and to a decree for the money in controversy. The decree below must be reversed, and a decree entered here in her favor.

The other justices concurred.

COURT OF APPEALS OF NEW YORK.

JOSEPH MARTIN ET AL., *Appellants*,

vs.

TRADESMEN'S INS. CO., *Respondent*.*

A company may safely deal with parties procuring an insurance upon the interest of others which is made payable to such parties where they hold the policy, and is justified at their request and upon their production of the policy in erasing the names of the original insured, and substituting those of others.

But where the legal title is held by one party as the representative of several interests, the interest of such party is the one which should properly be covered.

A party cannot complain of an alteration made in a policy with his consent, and which worked no harm to him; but an alteration made in a contract under which plaintiff claims without his consent, and while out of his hands, is of no effect.

The mortgagees empowered to receive the insurance moneys are responsible for their application to the mortgage debt.

RUGER, C. J.

The evidence at the close of plaintiff's case tended to show the following facts: At the solicitation of an insurance broker, apparently acting in behalf of mortgagees, on May 22d, 1880, the defendant issued and delivered an insurance policy to such broker reading, so far as the part material to this discussion is concerned, as follows: "Tradesmen's Insurance Company of New York on account of Martin & Kaskell, in case of loss to be paid in funds current in the city of New York to the Harlan & Hollingsworth Co., of Wilmington, Del., do make insurance and cause five thousand dollars to be insured upon the body, tackle, apparel, and other furniture of the

steamboat *Adelaide*," etc. On June 18th thereafter, some one, also presumably representing the mortgagees, presented the policy to the defendant, and requested it to erase the names of Martin & Kaskell, and insert that of John Garvey in place thereof upon the ground that Garvey was the owner of the steamer when insured, and such alteration seemed necessary to validate the policy. The defendant thereupon drew a line with a pen through the words "Martin & Kaskell," and interlined above them the words "John Garvey," and at the same time also inserted the words "to the extent of their interest and balance, if any, to John Butler," after the words "Wilmington, Del.," leaving, however, the original language of the policy as legible as before the alteration. It was then redelivered to the person producing it and returned to the Harlan & Hollingsworth Company, who, from its original execution to the time of the trial, presumptively retained its possession. It further appeared that the boat was purchased in May, 1879, of the Harlan & Hollingsworth Company, by Martin, Kaskell, and one Butler, but for certain reasons it being desirable to conceal Butler's interests in the transaction the bill of sale was taken in the name of Martin & Kaskell alone, one half to each. Subsequently, and in November, 1879, Butler becoming desirous of having his interest in the boat protected by some written evidence, requested Martin & Kaskell to convey it to John Garvey in trust for the then owners; and thereupon a bill of sale of the boat was executed by Martin & Kaskell to Garvey, and was delivered to some one for him, and he, so far as appears, retained it until the time of the trial. After the purchase of the boat in 1879, the plaintiff took possession and employed it in running between Long Branch and New York in the transportation of passengers until June 19th, 1880, when it was sunk and lost in the Hudson River through a collision with another boat. It also appeared that the plaintiffs advanced from the earnings of the boat to the Harlan & Hollingsworth Co. part of the premiums required to procure \$20,000 insurance upon the boat, and the same was effected in equal amounts of \$5,000 each in the defendants and three other companies, and that the Harlan & Hollingsworth Co. was at that time, and until after the loss of the boat continued to be the holders of mortgages thereon executed by Martin & Kaskell to the amount of the entire insurance. It also appeared that the Harlan & Hollingsworth Co. received from the respective insurance companies after the loss, upon the several insurance policies referred to, 75 per cent of the gross amount thereby insured, and applied the same upon

their mortgages, leaving due thereon the sum of \$5,000, that being precisely the amount remaining unpaid upon such policies.

On this state of facts the plaintiffs claimed to recover upon the ground that the act of the defendant in erasing the names of "Martin & Kaskell" from the policy, and inserting in place thereof that of "John Garvey," constituted a conversion of the policy as against them, rendering the defendant liable to the plaintiffs for the amount thereof or such other amount as might represent their interest therein.

Upon the trial the complaint was dismissed upon the ground that there was no proof of any damages sustained by the plaintiffs from the alteration of the policy. The judgment of the trial court was affirmed on appeal and from such affirmance this appeal was taken.

We are of opinion that these judgments should for several reasons be affirmed.

The form of the policy as originally drawn was somewhat peculiar, and was not probably such as would have been adopted by the parties had they been well advised. Although the interest of Martin & Kaskell alone is insured they were not then legal owners, and were never in equity sole owners of boat, and the policy does not provide for any recovery by them of the amount of the insurance. The plaintiffs probably had an insurable interest in the boat, but serious questions exist as to the value and extent of such interest, and the rights of Butler, their co-tenant in the proceeds of the policy.

Inasmuch as all of the interests both legal and equitable had been united in John Garvey as a trustee for all parties before the execution of the policy, it would obviously have been the safer plan to have named his as the insurable interest in the original instrument. As the policy was drawn it was undoubtedly the interest of Martin & Kaskell alone that was insured, yet in case of loss the amount thereof was required to be paid unconditionally to the Harlan & Hollingsworth Company, and it was apparently the sole beneficiary of the contract. Its right of recovery thereon in case of loss would undoubtedly be defeated by the want of an insurable interest in Martin & Kaskell, or any violation by them of the conditions of the policy, but the Harlan & Hollingsworth Company having paid a portion of the premium required, and having authority to effect insurance for their own benefit and receiving and holding the policy issued for that purpose with an interest therein covering the entire amount of the insurance, had for the purpose of protecting such interest apparent authority to procure such an alteration of the policy

as would promote the object intended in effecting it. So far as the defendants knew, they were the parties solely interested in the transaction, and until after notice of the rights or claims of other persons could safely deal with the parties procuring the insurance in reference to any change or modification of its terms. If the mortgagees were in fact the agents of the plaintiffs in procuring such insurance, and violated their instructions, either in procuring it or changing its terms to the prejudice of their principal, it would render them liable for the damages resulting therefrom. When, however, the insurer in issuing a policy deals with a party who remains in possession of the instrument after execution, and is alone entitled to recover the amount thereof in case of loss, he is authorized to assume that such party has power to make such changes in it before breach as will inure to the benefit of the insured, and tend to perfect a valid and enforceable contract. This would seem to be especially the case when the proposed alteration could neither injuriously effect the right of enforcing it or change the application of the moneys collectible thereon. Under both forms of the contract the moneys in this case were recoverable only by the Harlan & Hollingsworth Company, and would be when received applicable only to the satisfaction or reduction of the plaintiff's indebtedness to them.

Thus in any event the plaintiffs would, under either form of the policy, receive what they contracted for, and as it turned out, have no cause of complaint, whatever might have been the case under a different state of circumstances.

The legal title of the boat was unquestionably in John Garvey, and he held it as trustee for Martin, Kaskell, and Butler. The change made in the policy simply affected the form of the contract, and not the equitable rights of the parties, and seems to have been made in good faith simply for the purpose of validating it: *Meyer vs. Herneke*, 55 N. Y., 412.

There was obviously no intent on the part of either of the parties to the transaction to effect a destruction or cancellation of the instrument by its alteration, but it was made with intent solely to remedy a real or supposed defect which threatened its validity. No interest which the plaintiffs might have in the contract was impaired by the erasure complained of, for if it was made by their authority they had no right to complain, and if not, and such authority was necessary to be obtained, the alteration did not vitiate their contract or impair their right to enforce it. The rule is well estab-

lished that an alteration of a contract under which a plaintiff claims, made by a defendant or some third party without the plaintiff's consent, and while the contract is out of plaintiff's hands, has no effect, and the contract will remain as it originally stood, provided the nature and extent of the alteration can be clearly ascertained, and it can be seen what the contract was at the time it was executed: Addison Law of Contracts, 286, and authorities cited; Nichols vs. Johnson, 10 Conn., 192; Phillips on Ins., Secs., 114 and 115; Van Brunt vs. Eoff, 35 Barb., 501.

We are, therefore, of the opinion that the alteration in question was not a tortious act on the part of the defendants, and did not constitute a conversion of the policy. We are also of the opinion that the plaintiffs have suffered no damage from the act complained of.

At the time of the destruction of the *Adelaide*, they had no interest in the contract except to have the moneys recoverable thereon collected, and applied in reduction of their indebtedness to the mortgagees, and for the purpose of effecting this object the mortgagees were their agents, and responsible to them for the manner in which that right was enforced: Cone vs. Niagara Ins. Co., 60 N. Y., 619.

The whole insurance moneys were no more than sufficient to pay the mortgage, and would in no event afford a surplus recoverable by the owners of the property. But, however this may be, we have seen that the plaintiff's remedies upon the policy were not impaired by the alteration made in it and therefore they cannot have suffered damages by reason thereof.

The judgments of the courts below should be affirmed.
All concur.

SUPREME COURT OF MISSISSIPPI.

OCTOBER TERM, 1885.

Appeal from the Circuit Court of Chickasaw County, Second District.

M. A. POLLARD, Appellant,

vs.

PHOENIX INS. CO., Appellee.*

A Mississippi act provided for certain license fees for the privilege among others of keeping a store, and that any person who should exercise the privilege without paying the price and obtaining the license should suffer fine or imprisonment, and all contracts made with the violator in reference to the business thus carried on should be void only so far as such violator may base any claim on them, and no suit should be maintainable thereon by such violator.

Held, That the statute applies as well to an insufficient license as to a business carried on without license.

***Held*, That the violator may maintain suits to defend title to his property, but not to enforce contract rights in respect to the business.**

Held, That a policy on the stock of goods is incidental to the business, and in case of loss, payment cannot be enforced by a merchant who has taken out license insufficient for the quantity of his stock.

Messrs. R. S. BUCK, MILLER, SMITH & HIRSH, of Vicksburg, Miss.,
Messrs. W. G. ORR, and T. J. BUCHANAN, JR., of Okolona, Miss., and
Mr. J. A. ORR, of Columbus, Miss., for Appellant.

Messrs. W. P. & J. B. HARRIS, and NUGENT & McWILLIE, of Jackson, Miss., and Messrs. HOUSTON & WILLIAMS, of Okolona, Miss., for Appellee.

* Decision rendered, Feb. 15, 1886.

CAMPBELL, J.

The replication to the fifth plea was sufficient. It directly traverses the averment of the plea that the plaintiff did not as soon as possible after the loss, render a particular account of it, as required by the policy, "and affirms that the plaintiff did render such account as soon as possible, as the nature of the case and surrounding circumstances would admit." The addition of the words quoted was the mere expression of what the law implies in every such case, viz.: that the particular account shall be rendered as soon as possible in the nature of the case, and under the circumstances in which the person is compelled to act.

The demurrer was a general one, and it was not assigned for cause that the replication was too general, and did not state the special circumstances relied on by the plaintiff to justify any delay in furnishing the particular account, and the sufficiency of the replication in that point of view is therefore not presented.

We are called upon to determine, whether one exercising the privilege of keeping a store, without paying the price and obtaining license as prescribed by law, and effecting insurance of the stock of goods so employed can recover on the policy in case of their loss. An answer to this question requires an interpretation of § 589 of the code, which declares that any person who shall exercise any of the privileges enumerated, "without first paying the price and procuring license as required, shall on conviction be fined * * * or imprisoned * * or by both * * * and all contracts made with any person who shall violate this act, in reference to the business carried on in disregard of this law, shall be null and void, so far only as such person may base any claim upon them, and no suit shall be maintainable in favor of such person on any such contract."

The purpose of the act is manifest. It is to constrain those who would enjoy the privileges taxed to pay the price and obtain license by a twofold penalty, one being fine or imprisonment, or both, and the other disability to claim under any contract made in reference to the business carried on in disregard of law: one to be enforced through the machinery provided for the punishment of misdemeanors, and the other on the plea of the party sought to be held liable on the contracts made in reference to the business. We repudiate the distinction attempted to be maintained between not obtaining license at all, and obtaining an insufficient one.

The statute denounces its penalty against him who fails to pay the price and obtain license, and he who pays the price of a busi-

ness less than that prescribed, and carries on a business greater than he has paid for the privilege of conducting is as much within the contemplation of the statute as he who pays no tax. It may be said, that undervaluation is the form in which the chief frauds are committed on the revenue. He who pays no tax is almost sure to attract attention to his default, and to be visited by the penalty of the law, while successful fraud may be practiced by paying a small tax, and under color of the license thus obtained transacting business on a scale much larger than that authorized by the license purchased. As the statute is broad enough to include it, and the case of one who pays a small tax and does a large business is a common form of the evil sought to be remedied by the penalty prescribed, it must be assumed that the legislative purpose was to embrace it.

The statute does not deprive the owner of his property embarked in the business illegally carried on. The title is not in any manner affected. All the incidents of title remain, with the rights of owner, in all respects, as to the property, except that no contract made in reference to the business not duly licensed can be enforced by him who has violated the law in carrying on the business. The owner may resort to the courts, and maintain any action to the maintenance of which title to the property entitles him, unaffected by the fact that the property is employed in business unlawfully carried on, because the disability imposed by the statute extends only to rights founded on contracts made in reference to the business. The distinction is between title with its incidents, and power to contract with respect to the subject of it. Not the title of the delinquent owner is impaired, but his capacity to make a contract he can enforce whereby to make successful the business he is illegally conducting.

The common law as to contracts founded on or growing out of illegal considerations furnishes no guidance in ascertaining the true interpretation of the statute. The common-law rule of invalidity of contracts was not looked to in framing this statute, which speaks the will of the law-makers, and it must be found in the words employed for that purpose. It is therefore needless to inquire what would have been the rule, if the statute had not declared the consequence of its violation. The question is, what does the statute declare? When that is ascertained it must prevail. Its language is plain, and unambiguous. It declares that no suit shall be maintainable, in favor of the violator of the law, on any contract made by him in

reference to the business carried on in disregard of this law. The controversy is as to the scope of the expression, "In reference to the business carried on in disregard of this law," for only as to such contracts is disability to maintain a suit imposed. The language should not be extended beyond its plain meaning, nor should it be limited within narrower bounds. We should not extend it by construction, nor fritter it away by refinement, but should so interpret it as to effectuate the intention of the legislature in passing it. What is the plain, ordinary, popular signification of the language employed, its natural, unstrained meaning?

We answer; it embraces all contracts in the prosecution of the particular business, which relate to it, and have for their object its maintenance, protection, or furtherance all which pertain to it, and grow out of it.

The phrase, "In reference to the business" is synonymous with having relation to, regarding, in respect to, concerning, pertaining to it, and the contracts which the delinquent is incapacitated to claim the benefit of are those included in these terms.

Was the contract made in the prosecution of the business? Did it grow naturally out of it? Was incident to it, connected with it, relating to it; did it regard it and pertain to it? If so, it is one which the delinquent dealer cannot enforce, for to permit it would be to enable him to make valid contracts whereby to secure himself against loss in his illegal venture—to guard the cargo against perils incident to the forbidden voyage, and thereby save himself from the penalty declared against his temerity.

Is a policy of insurance on a stock of goods in a store carried on in violation of law a contract in reference to the business? It is made to cover such goods as may constitute the stock when a loss occurs. It is a contract for indemnity against loss. It grows out of the business, it pertains to it, and concerns it, it relates to it, and is made for its success. It is impossible to dissociate the ideas of the stock of a merchant and the business in which he is engaged. True, buying and selling constitute the principal operations of a merchant, but there are many accessories. The illegality of the principal things involves and infects the incidents. Shall it be said that the unlicensed dealer is incapacitated to make an enforceable contract to buy or sell goods, but he may make one for their preservation or for indemnity against their loss? that although they are being used for profit in an unlawful business, and are kept for that purpose, a lawful contract may be made for indemnity against their loss by a casualty

incident to the business? although no enforceable contract may be made for their sale, one may be made for their conservation or replacement, in order that they may continue to be dealt with in violation of law? To permit the unlicensed merchant to stipulate for protection against loss of goods by a casualty incident to the business would be to allow him to acquire rights by contract from an illegal business, in the face of the statute which denies it. The statutory incapacity relates to all dealing with reference to the stock of goods kept for sale. The price of license is graduated with reference to the amount of such stock and contracts pertaining to it are what cannot be enforced. The scope of the business of a store embraces the purchase, care, preservation, and sale of goods, and the disability of the violator of the law extends to all the operations of the business. He cannot claim the benefit of any contract made in its prosecution, growing out of it, and having relation to it.

So the law is written.

Were a merchant to make a power of attorney authorizing one to take charge of his store, and make all contracts "in reference to the business," it could not be denied that the agent might effect insurance on the stock, and bind his principal by a bill or note for the premium. Why should the same language have a different meaning in a statute?

Reversed.

SUPREME COURT OF NEBRASKA.

Quo Warranto.

STATE, EX REL. ATTORNEY-GENERAL,)

vs.)

FARMERS' ETC. INS. CO.*)

A contract by which one party for a consideration promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest, is a contract of insurance, whatever may be the terms of payment of the consideration by the assured, or the mode of estimating or securing payment of the sum to be paid by the insurer in the event of loss.

Upon the facts appearing in the record, *Held*, that defendant was a mutual insurance company, and as such must comply with the provisions of the act of June 1, 1873, and receive the certificate of the auditor of State before transacting business.

WILLIAM LEESE and N. K. GRIGGS, for Plaintiff.

HARWOOD, AMES & KELLY, for Defendants.

REESE, J.

This is an original proceeding instituted for the purpose of ousting defendants from transacting the business of life insurance. The information alleges in substance that defendant association is now, and has been for some time, transacting the business of life insurance within the State, and issuing policies or certificates of insurance upon the lives of persons within the State; that it has not complied with the laws of the State relating to the transaction of the business of life insurance, and has not at any time obtained a certi-

* Opinion filed, October 21, 1886.—From *Northwestern Reporter*.

cate from the auditor of State permitting it to transact such business, and that it has no authority of law to engage therein; that defendants McBride, Gillispie, Hoagland, Currie, Fletcher, and Tamblin are the officers of said association, and as such are soliciting risks and effecting contracts of insurance in its behalf. Exhibits are attached showing the form of "application for membership," "certificate of membership," "security notes," "receipt for membership fee," circulars, etc., in use by defendants for the purpose of effecting the issuance of indemnity or insurance upon the lives of persons. The answer consists alone of the denial "that the defendant the Farmers & Mechanics' Mutual Benevolent Association has not complied with the laws of the State of Nebraska relating to the transaction of the business of life insurance within said State." Upon the argument it was conceded by defendants that no certificate or permission of the auditor had been issued to them as is required by law to be issued to insurance companies, but it was contended that no such certificate was necessary; that defendant association is not an insurance company in contemplation of law, and therefore is not within the restrictions and prohibitions of the act of 1873 (chapter 43, Comp. St.)

The certificate of membership, omitting the name of the assured is as follows :—

Farmers & Mechanics' Mutual Benevolent Association. Incorporated under laws of Nebraska, October, 13, 1884, Lincoln, Nebraska. This certificate of membership witnesseth and declares :—

That in consideration of the representations and agreements made in the application for this certificate of membership, and bearing even date herewith, which is made a part of this contract, the payment of an admission fee of not exceeding ten dollars, the payment of one dollar and seventy-five cents on or before the tenth day of May, 1885, and the same amount semi-annually thereafter, and the payment on or before maturity of such benefit assessments as may be legally levied by the board of directors, the Farmers & Mechanics' Mutual Benefit Association issues this certificate of membership, and constitutes ———, of ———, county of ———, State of Nebraska, a member of said association, with all the rights and privileges thereof, subject to the following conditions and agreements, and the provisions of the by-laws of said association.

DEATH BENEFITS.

Upon the receipt at the office of the association, in Lincoln, Nebraska, of satisfactory proofs of the death of said member, he having conformed to all the conditions of membership, this association will pay to ———, or the legal heirs of said member, the net proceeds of one full assessment at schedule rates upon all contributing members at date of such assessment, and which

is received at the Lincoln office within thirty days from the date of the notice thereof, to an amount not exceeding five thousand dollars, to be paid within thirty days thereafter at the office of the association at Lincoln, Nebraska.

PERSONAL BENEFIT.

And this association further agrees that whenever this certificate shall have been maintained in full force by the prompt payment by the said member, on or before maturity, of all dues and assessments for the period of ten full consecutive years, this certificate may then mature, in which case this association will then pay to the said member personally the net proceeds of a half assessment at schedule rates upon all contributing members at that date, and which is received at the Lincoln office within thirty days from date of the notice of assessment thereof, not exceeding two thousand dollars: provided, that upon payment of said amount this certificate shall be canceled and surrendered to this association, and provided, further, if the said member shall allow his certificate to lapse from any cause whatever, that the time of estimating when said ten years shall commence to run shall date from the date of his restoration to membership, and not from the original date of certificate: provided, the member shall not be assessed for this benefit, nor be entitled to the same, unless he has especially made application for this benefit when applying for membership.

ACCIDENT BENEFIT. CLASS THREE.

It is further stipulated that in case the member above has been in good standing in this association for a period of six full consecutive months, and becomes disabled by accident, not contracted in an immoral way, so as to be unable to perform any ordinary business or duties of life, he shall be entitled to receive ten dollars per week while so disabled: provided, that no sickness of less than one week shall be considered, and fractions of a week shall not be counted; and to pay this accident benefit, and incidental expenses not otherwise provided for, a full assessment shall be made from time to time as necessity may require, but no one person shall receive an accident benefit for a greater time than ten weeks at any one time for any one accident, nor shall they be paid exceeding the net proceeds of one full assessment.

The special conditions on the back of this certificate are made a part hereof, and binding on both parties. This certificate is for a personal benefit, and is for an accident benefit, and is subject to assessments for personal and accident benefits as provided herein and in the by-laws of the association.

In witness whereof the said Farmers & Mechanics' Mutual Benevolent Association has caused this certificate of membership to be signed by the president and countersigned and sealed by the secretary at the office of the association in Lincoln, Lancaster County, Nebraska, this sixteenth day of March, 1885.

_____, Secretary.

_____, President.

The special conditions referred to as on the back of the certificate are too lengthy to be copied here, but it may be stated briefly that the mailing of a printed or written notice to a member shall be

considered a legal notice. The association reserves the right to make special assessments for the purpose of paying accident benefits, and to pay for the expenses of the association not otherwise provided for. The name of the beneficiary may be changed upon the written request of the member, the surrender of the certificate and the payment of two dollars and fifty cents, and the issuance of a new certificate. Notice of the death or disability of the member shall be sent to the office of the association within ten days from the time of death or disability. If the certificate becomes void from any cause, all payments made thereon are forfeited to the association. Accident benefits may be waived upon application to the secretary. When a member fails to pay his dues or assessments, his security note becomes due and payable. The member forfeits all rights in the association by failure to pay assessments within thirty days from their date; the failure to pay semi annual dues within thirty days after they become due; the immoderate use of alcoholic liquors, or the concealment or misrepresentation of any material facts as to health when applying for membership; the perpetration or attempt to perpetrate any fraud on the association by the member, his beneficiary, or any one having an interest in the certificate, and the graduated schedule of rates in blank depending upon the age of the member.

That this is a contract of insurance cannot, we think, in the light of the almost if not quite uniform holdings of courts and opinions of text-writers, be doubted. In *Com. vs. Wetherbee*, 105 Mass., 149, it is held that "a contract by which one party, for a consideration, promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest, is a contract of insurance, whatever may be the terms of payment of the consideration by the assured, or the mode of estimating or securing payment of the sum to be paid by the insurer in the event of loss, and although the object of the insurer in making the contract is benevolent and not speculative." The contract does not differ in any essential feature of form or substance from a contract of insurance. The subject insured is the life or health of the member. The assured pays a certain sum (ten dollars) at the inception of the contract, which is fixed by the insurer (association); a promise to pay assessments punctually, when called for, is made by the assured, together with stipulated semi-annual dues, which is fixed by the directors. Upon the condition of these payments being promptly made the insurance is made to depend. At the death of the mem-

ber (assured), upon proof of the fact within ten days thereafter, the beneficiary is to receive a sum of money not exceeding \$5,000. This is none the less an insurance because the amount to be paid is not a gross sum, but graduated by the number of "contributing members" at the date of the assessments therefor, nor because there is no legal method of enforcing payment of the assessment necessary to provide for the payment of the "death benefit," but declares the contract of membership at an end, and all payments made thereon forfeited to the company.

The courts have, with a great degree of unanimity, treated all such organizations as substantially life insurance companies, applying to them, and to the mutual relations of the members, the rules and principles applicable to the contract of life insurance: *May, Ins.*, sec. 550. See also *Bolton vs. Bolton*, 73 Me., 299; *State vs. Standard Life Ass'n*, 38 Ohio St., 281; *State vs. Miller*, 23 N. W. Rep., 241; *State vs. Bankers etc. Ass'n*, 23 Kan., 499; *Arthur vs. Odd Fellows' Ass'n*, 29 Ohio St., 557; *Illinois Masons' Ben. Soc. vs. Winthrop*, 85 Ill., 537; *Same vs. Baldwin*, 86 Ill., 479; *Schunck vs. Gegenseitiger*, 44 Wis., 369; *State vs. Live-stock Ass'n*, 16 Neb., 552; s. c., 20 N. W. Rep., 852.

It is virtually conceded by defendant in its brief and argument that the rules governing insurance companies must be applied to defendant, but a vigorous attack is made upon the law of this State upon the subject of life insurance, and it is claimed that the act above referred to is intended to crush out organizations like defendant, in the interests of what are usually termed the "old-line" companies. It is nowhere suggested that the act is unconstitutional, nor that it was not legally passed by the legislature. Such being the case, we cannot inquire into the propriety of the action of the legislature, but must accept and enforce the law as we find it.

Since defendants have not complied with the provisions of section 6 of chapter 16, and sections 7 and 8 of chapter 43, of the Compiled Statutes (being an insurance company against accident), they have no authority to transact the business in which they are engaged, and judgment must be entered in accordance with the prayer of the petition.

SUPREME COURT OF INDIANA.

Appeal from the Jasper Circuit Court.

GEORGE STITZ

vs.

STATE OF INDIANA.*

Overvaluation of insured property is competent evidence in case of arson, not for the purpose of impeaching the character of the insured, but as showing a motive for the crime. But the accused was entitled to an instruction that if the overvaluation was the result of mistake or error in judgment, it was not necessarily evidence of a wicked motive or criminal intent.

In order to convict of arson, all the jurors must be satisfied of the guilt beyond a reasonable doubt, and it is error to charge that there should be no acquittal unless all the jurors entertain a reasonable doubt of guilt.

ELLIOTT, J.

The indictment upon which the appellant was convicted, charges him with the crime of arson, and charges also, that the crime was committed for the purpose of defrauding the Phoenix Fire Insurance Company, which had issued a policy of insurance upon the building burned.

The State was permitted to give in evidence a claim made by the appellant for property destroyed by the fire, and to prove that he put a value upon the property beyond its real worth. We regard this evidence as competent. We do not, however, agree with the counsel for the State that it was competent for the purpose of impeaching the character of the accused; on the contrary, we regard the theory of counsel for the State upon this point as radically er-

* Opinion filed, December 31, 1895.

roneous. Character cannot be impeached by evidence of specific acts. This familiar principle shatters the theory of the State.

In proceeding upon this theory counsel were led into serious error in their argument to the jury, and the court followed them, to the manifest injury of the appellant.

We put our ruling on the ground that the evidence was competent, as tending to show a motive to commit the crime. If an accused has a policy of insurance on his property and claims from the insurer more than the property is worth, it supplies some evidence of a wicked motive. If a man should claim, under oath, \$1,000 for property of no greater value than \$100, that fact would supply some evidence tending to establish a motive for setting fire to the building in which it was situated.

It would, however, be a mere circumstance to be considered in connection with other facts. Of itself it would be of no great weight, but it would nevertheless be some evidence of a criminating character.

The law recognizes the principle that men are impelled to commit crime from some motive. There are, indeed, few motiveless crimes, and among the motives impelling men to crime is that of gain. In a thoughtful and philosophical treatise it is said: "As there must pre-exist a motive to every voluntary action of a rational being, it is proper to comprise in the class of moral indications such particulars of external relation as are usually observed to operate as inducements to crime." And among the motives that influence human conduct, this author classes that of gain: *Wills, Civ. Ev.*, 39. Another author says: "In looking at the motives which instigate human conduct we ascend to the very origin of crime:" *Burr., Civ. Ev.*, 281. At another place this author says: "The motive of gain, in the stricter sense of the term, may be excited by two different classes of objects; first, by something visible and tangible, which the party meditating the crime desires to possess; and secondly, by some substantial benefit which it is expected to accrue as the result of the contemplated act: *id.*, 285.

The case of *State vs. Cohn*, 9 Nev., 179, supplies an illustration of the practical application of these principles. In that case the appellant was charged with arson, and it was held that evidence of over-large insurance upon his goods was competent to show a possible or probable motive, such motive being a material link in the chain of circumstances. In the course of the opinion in that case it was said: "Now, it is not a natural thing for a man to fire his own prem-

ises; presumptively, appellant was innocent. What then is the natural and logical course of human thought at such a juncture? Is it not to inquire what motive, if any, existed which could have influenced a sane person to do such an act? Such was the course pursued by the prosecution; the motive was sought, and by it claimed to be found in the fact of an undue insurance; not only a perfectly proper proceeding, but indeed the only one open." The same principle is declared in *Commonwealth vs. Hudson*, 97 Mass., 565, and in *Shepherd vs. People*, 19 N. Y., 537.

In this last case, Deino, J., speaking for the court said: "The prisoner's house had been burned, and he was charged, upon circumstantial evidence, with having set it on fire. *Prima facie* he had no motive for the act, but a strong pecuniary one against it. But if he had a contract of indemnity, and especially if, under it, he might probably obtain more than the value of the property, the case would be quite different."

Mr. Bishop says: "Evidence that the insurance was for more than the worth of the building is pertinent; also that the defendant attempted to procure payment of what was thus excessive:" 1 Bish., Cr. Pro., sec. 50.

These cases are in harmony with the general rule which that author thus states: "Hence proof of motive is never essential to a conviction. But it is always competent against the defendant: 1 Bish. Cr. Pro., sec. 1,107; *Wills*, Cir. Ev., 41; *Goodwin vs. State*, 96 Ind., 550—see p. 560.

While it is competent to prove facts tending to show an evil motive, yet such facts are always susceptible of explanation. Motive is but a circumstance, and it is always proper to explain the act which is adduced as evidence of a wicked motive. This is true of the present case. If the valuation of the property was made by mistake, or was a mere honest error of opinion, the probatory force of the fact that there was a claim made for a value greater than the actual one, would be materially weakened, if not entirely destroyed. It is not uncommon for men to place too great a value on their own property, and an error in doing so is not necessarily a criminating circumstance: *Citizens Ins. Co. vs. Short*, 62 Ind., 316.

The accused was entitled to an instruction, that if the overvaluation of the property was the result of an error of judgment, or of a mistake of fact, it was not necessarily evidence of a wicked motive or criminal intent. Our opinion is, that the court erred in refusing the instruction asked by the appellant upon this point.

The court gave to the jury this instruction : " While each juror must be satisfied of the defendant's guilt beyond a reasonable doubt to authorize a conviction, such reasonable doubt, unless entertained by all the jurors, does not warrant an acquittal " This instruction is palpably erroneous. There can be no conviction of a crime unless all the jurors are satisfied beyond a reasonable doubt, of the guilt of the accused. The law upon this point is firmly settled. The instruction before us in effect reverses this rule, for it informs the jury that " such reasonable doubt, unless entertained by all the jurors, does not warrant an acquittal. " This must have induced the jurors to think that unless all concurred in entertaining a reasonable doubt, the verdict should be against the defendant. This is in direct opposition to the rule declared by our decisions : *Castle vs. State*, 75 Ind., 146; *Clem vs. State*, 42 Ind., 420.

This instruction is essentially different from the one passed upon in *Fassinow vs. State*, 89 Ind., 234.

A reasonable doubt entertained by some of the members of the jury may not compel an acquittal, but it may so strongly prevail and among so many, as to warrant others in yielding their opinions and joining in a verdict of acquittal. At all events, an instruction which indicates, as the one under immediate mention does, that individual jurors should not acquit unless all the members of the jury entertain doubts of the defendant's guilt, is erroneous. It may possibly be that in a case where the evidence satisfactorily shows the guilt of the accused, there should be no reversal for such an error as that committed in giving the instruction; but, however this may be in other cases, in such a case as this, where the evidence is far from satisfactory, we cannot disregard the error committed in giving the instruction under examination.

There are other instructions given which we deem erroneous, but we do not think it necessary to discuss them, for the judgment must be reversed for the errors pointed out.

Judgment reversed.

And prisoner ordered back from prison and new trial ordered, with instructions.

SUPREME COURT OF PENNSYLVANIA.

Error to the Common Pleas of Lebanon County.

HOME MUT. LIFE ASS'N OF PENNSYLVANIA

vs.

GILLESPIE.*

One of the conditions of a policy of insurance issued was that, if any untrue statement were made in the application or policy, the company should be free from all liability under it.

The application for the policy set forth, "Have you been subject to or had any of the following disorders, open sores, lumps, or swelling of any kind; also "Have you ever had any malformation, illness or injury, or undergone any surgical operation." *Held*, that it would be unreasonable to suppose that the parties had in contemplation the reading and understanding of these questions in general terms, as it would be impossible for a person of mature years to remember the common and trivial ailments he may have suffered from in childhood. By open sores or swelling was meant such continuous or recurrent ones as result from disease or disorder, such as result by defective action from some functional derangement.

By illness or injury was meant an illness or injury of such a nature and importance as would reasonably fall within the line of inquiry proper to be pursued in furtherance of the matter under consideration.

The Home Mutual Life Association of Pennsylvania insured the life of Anthony Gillespie for the sum of \$2,000, for the benefit of his son, John W. Gillespie. Upon the death of Anthony Gillespie, suit was brought against the company to recover the amount of the policy. The company defended on the ground that untrue answers had been made to questions set forth in the application, and that, therefore, by the conditions of the policy, there was no liability upon the part of the company.

* Opinion filed, October 5, 1885.—From *Eastern Reporter*.

GRANT WEIDMAN, *for Plaintiff in Error.*

J. P. S. GOBIN and W. H. M. ORAM, *for Defendant in Error.*

CLARK, J.

This is an action of debt on a policy of insurance issued January 11, 1881, by the Home Mutual Life Association, to John W. Gillespie, upon the life of his father, Anthony Gillespie, who died May 23, 1883.

By the terms of the policy, the application was made part of the contract of insurance, and each of the statements, and the answers to the questions therein contained, are admitted to be material, and are warranted to be full and true, and to be the only statements upon which the contract of insurance was made. One of the conditions of the policy provided that, if any statement made in the application or in the policy was in any respect untrue, the consideration of the contract should be deemed to have failed, and the association should be free from all liability under it.

It is undoubtedly true that the validity of the contract depends upon the truth of the warranty. The materiality of the thing warranted to the risk, or the good or bad faith of the warrantor, is of no consequence; the engagement of the policy-holder is absolute, that the facts shall be as they are stated, when his rights under the policy attach: *State Mut. Co. vs. Arthur*, 30 Penn. St., 331; *Commonwealth Mut. Co. vs. Huntzinger*, 98 id., 41; *Mut. Aid Soc. vs. White*, 100 id., 12; *Blooming Grove Mut. Co. vs. McAlarney*, 102 id., 335.

Whilst, however, the insured is held for the exact truth of his warranty as a condition of his recovery, it must first be ascertained, under the ordinary rules of construction, what the thing is that is warranted; and this being ascertained, the insured is held to a full and literal performance of it. But the words of a warranty, or of a contract of insurance, must receive a reasonable interpretation. When the words of any contract have a clear meaning consistent with and relevant to its object and purpose, the intention of the parties, in the absence of fraud or mistake, cannot be shown to override this meaning. But if the words employed, in their literal or unrestricted sense, are inconsistent with the main and obvious purpose of the instrument, or are foreign to the purpose of its provisions, they may, if reasonably susceptible, receive such interpretation as accords with the object in view, and the clear intent of the parties. "If the natural interpretation, looking to the other provisions of the contract, and to its general object and scope, would lead to

an absurd or unreasonable conclusion, as such a result cannot be presumed to have been within the intention of the parties, such interpretation must be abandoned, and that adopted which will be more consistent with reason and probability: "May Ins., 182. The contract in such cases will be construed liberally in favor of the object to be accomplished.

In his physical examination by the medical examiner, made a part of the application, the insured was interrogated, and replied as follows:—

4. "Have you been subject to, or had any of the following disorders or diseases:" "Open sores, lumps or swelling of any kind?" A. "Nothing of that kind to my knowledge."

9. "Have you ever had any malformation, illness or injury, or undergone any surgical operation?" A. "No."

These questions, it must be admitted, are in the most general terms, and if they are to be so read and understood, they are not only unreasonable, but absurd. A slight cutting of the finger with a penknife may for a time produce both an open sore and a swelling; the mere indisposition arising from cold is an illness; the stubbing of a toe is an injury, and the most trivial operations with hand or knife may be said to be surgical. It would be impossible for a person of mature years to remember, and absurd for the association to inquire as to the common and trivial ailments or injuries he may have suffered from his earliest childhood, and it is unreasonable to suppose that those were in contemplation of the parties.

The form of the fourth question indicates, however, that the open sore or swelling intended is such as results from "disease or disorder," that is to say, such as result by defective action from some functional derangement, and not from wounds or accidental injuries, and the court was right, we think, in saying that they were to some extent permanent or continuous, connected or recurrent. So, the illness or injury referred to must be of such nature and importance as would reasonably fall within the line of inquiry proper to be pursued in such cases. We do not say that the illness or injury must be such as would be material to the risk, but such as in the judgment of the jury was reasonably in contemplation of the parties, in view of the nature of the matter under consideration. If the line of distinction is obscure and difficult to draw, the fault is with the asso-

ciation for making it so. We do not believe that the assured was expected or required to remember and to recite in his application all of the trivial ailments of his life.

Whether the injury received by Anthony Gillespie at Cold Harbor from the bursting of a shell was of such a trifling and unimportant nature as made it unworthy of mention, or was such an injury or open sore as could not have been contemplated in the examination, was, under all the evidence in the cause, a question for the determination of the jury, and we think that question was, under the charge of the court, fairly submitted.

The judgment is affirmed.

Green, J., dissents.

SUPREME COURT OF CALIFORNIA.

IN RE APPLICATION

OF

LA SOLIDARITE MUT. BEN. ASS'N.* }

The by-laws of a beneficial association provided that upon the death of a member, and in order to make up the amount to be paid over to his nominee or nominees, each member should pay one dollar in gold or silver coin. It was further provided that at the death of a member who had regularly paid his assessments his nominee or nominees should be entitled to claim and receive from the association the amount collected on the assessment to be levied therefor. *Held*, that such nominee was entitled to claim from the association only the sum which was actually collected on an assessment, and not one dollar for each and every member.

The passage of a resolution by the members of such association authorizing a larger sum to be paid to such nominee will not entitle the latter to claim the same if the resolution was never adopted or ratified by the directors, without whose order no money could be appropriated or drawn from the treasury.

Appeal from a judgment of the superior court of the city and county of San Francisco, entered in favor of the petitioner, and from an order denying the contestant a new trial. The opinion states the facts.

S. H. HENRY and F. J. CASTLEHUN, *for the Appellants.*

A. C. BRADFORD and ROBERT FERRAL, *for the Respondent.*

BELCHER, C. C.

This is an application by a beneficial association for leave to disincorporate. Eliza Little filed objections to the application, in which she alleged, among other things, that her husband died on the 29th day of January, 1882, a member of the association; that at the time

* Opinion filed, January 27, 1886.—From *W. C. Reporter*.

of his death there were three hundred and fifty-five members, and that she was the nominee of her husband, and as such entitled to receive three hundred and fifty-five dollars, but had only been paid one hundred and fifty dollars.

The case was tried and judgment entered dissolving the corporation, from which and from an order denying a new trial the appeal is prosecuted.

The findings do not meet all the issues raised by the objections, but as a reversal for this reason would not benefit the appellant if the other questions are decided against her, she seems in effect to have waived this point.

The real question presented for decision is, Was the appellant entitled to receive as many dollars as there were members of the association at the time of her husband's death, or only such sum as was actually collected from the members upon the assessment made for her benefit?

By the by-laws it was provided that upon the death of a member, and in order to make up the amount to be paid over to the nominee or nominees, each member should pay one dollar in gold or silver coin.

It was further provided that at the death of a member who had regularly paid his assessments his nominee or nominees should be entitled to claim and receive from the association the amount collected on the assessment to be levied therefor.

What is the meaning of these provisions?

It is insisted for the appellant that they should be so construed as to give her one dollar for each member, whether collected or not. We do not agree with counsel in this. They seem to us to have a plain and obvious meaning, and not to admit of the construction asked to be put upon them. While it was provided that each member should be assessed and required to pay one dollar for the benefit of every deceased member's nominee, it was evidently contemplated that some members might fail to pay, and in that event the nominee was to receive only the amount collected on the assessment.

In our opinion the appellant was entitled to claim from the association only the sum which was actually collected on the assessment, and not one dollar for each and every member.

But if this be so, it is said that at a meeting of the members of the association, held on the 1st day of April, 1882, a resolution was introduced and passed "that after the assessment of W. F. Brisac

has been collected the claims of the nominees of the seven decedents remaining unpaid be paid an equal amount as the nominee of W. F. Brisac shall receive;" that the nominee of Brisac received two hundred and fifty-two dollars, and that Little was one of the seven decedents referred to, and under the resolution his nominee was entitled to claim and receive an equal amount.

It does not appear that the nominee of Brisac was paid any greater sum than the amount collected on the assessment. But, whether she was or not, we fail to see how the resolution can aid the appellant. It was not adopted or ratified by the directors, and without their order no money could be appropriated or drawn from the treasury. It is settled law in this State that a "corporation can only act, can only speak, through the medium prescribed by law, and that is its board of trustees:" *Gashwiler vs. Willis*, 33 Cal., 20.

Looking at the whole record, we fail to see any error prejudicial to the appellant, and the judgment and order should therefore be affirmed.

Searls, C., and Foote, C., concurred.

By the Court. For the reasons given in the foregoing opinion the judgment and order are affirmed.

UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF NEW YORK.

ÆTNA NAT. BANK, OF HARTFORD, CONN., ET AL. }

vs. }

UNITED STATES LIFE INS. CO. ET AL.*

Judgment creditors had filed a bill to have the proceeds of a policy on the life of the debtor, who was deceased, and which was payable to the wife, applied in satisfaction of their judgment, as having been procured by the application of funds belonging to the creditors. The wife opposed on the ground that under the statutes of the State where the contract was made, no such claim was allowable.

Held, That the company was entitled to pay the money into court to await the settlement of the case, where all the claimants were before the court.

WILLIAM S. MELVIN, *for Complainants.*

O. P. BUEL, *for the Insurance Co.*

JOHN W. WEED, *for Defendant Harwood.*

BROWN, J.

The complaint in this case is in the nature of a judgment creditors' bill filed by several judgment creditors of Norman B. Harwood, late of Florida, deceased, to have applied in satisfaction of their judgments the amount payable by the United States Life Insurance Company upon a policy of life insurance effected on the life of the judgment debtor, and payable, according to the terms of the policy, to his widow, the defendant Susan B. Harwood. The grounds of the complainants' claim are two: First, a fraudulent use of large sums of money belonging to the judgment debtor in procuring the insurance; and, second, the provisions of the statute of the State of New York (Laws 1858, c. 187, § 1), that when the premiums paid exceed \$500 per year, the excess shall accrue to the benefit of the husband's creditors. Both defendants have appeared and answered; the insurance company making no defense, but stating its readiness to pay the amount due upon the policy to whom-

* Decision rendered, November 24, 1885.

soever may be entitled to it. The widow, by her answer, denies generally all the allegations of fraud, and alleges that under the statutes of Florida, where the contract was made and the policy delivered, no such exception in favor of creditors exists, and that the whole amount of the policy is due and payable to her. The insurance company now moves for leave to pay the money into court, as having no interest in the controversy.

The motion has been argued with great care upon both sides. The defendant Harwood insists that nothing should be done by the court to relieve the insurance company from its alleged duty of paying her at once, according to the terms of the policy, and without regard to the complainants' claims. The complainants, however, have a legal right to conduct the proceedings that have been instituted to a judicial termination. Both defendants have appeared, the fund is within the jurisdiction of the court, and the court must ultimately make a final decree, disposing of the fund and of the rights of the parties. By the filing of the bill the complainants have acquired an equitable lien upon the fund for any amount they may ultimately succeed in holding applicable to their judgments, whether it be the whole or only a part of the fund; and this decree will be binding and conclusive upon Mrs. Harwood, as well as upon the insurance company. The insurance company, therefore, cannot safely pay either claimant, except at its peril of anticipating rightly the ultimate judgment of the court. The fund in question arises under the policy of insurance, both parties claiming under the same instrument.

Without considering in detail the numerous cases on the subject of interpleader that have been cited, I am of opinion that in the situation of the parties in this case, the motion should be granted. The equitable lien which the complainants have obtained by the filing of their bill is a controlling feature. The fund must be disposed of in this cause. The insurance company has no interest, as between the opposing parties contending for the fund, and is substantially in the situation of a stakeholder. It should be allowed, therefore, to pay the money into court, including the interest upon it from the time it became due and payable, according to the terms of the policy. One advantage that will accrue to Mrs. Harwood from such an order will be the power of the court to award her at once, upon her application, and upon suitable security, the payment of a portion of this amount, should satisfactory reasons therefor appear.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BASSETT

vs.

PARSONS.*

The sum payable under an insurance policy to the defendant absolutely, or in a contingency, passes, in case of his insolvency, to his assignee.

This was an action of contract on a probate bond. The material facts, which appear in the opinion, were reported to the full court on an agreed statement.

HILL and WAINWRIGHT, *for Plaintiff.*

D. W. BOND and J. C. HAMMOND, *for C. L. Parsons, and J. Crofts, assignee.*

HOLMES, J.

This action was brought April 13, 1880. A special precept of attachment was issued November 9, 1884, and the Continental Life Insurance Company was summoned as trustee. At both dates there was a policy outstanding on the life of the defendant, by the terms of which the sum insured had become absolutely payable to him November 1, 1884. Just before the service of the trustee process, after the bringing of the suit and before the service of the trustee process, the defendant had gone into insolvency, and his assignee had been appointed, who appears as claimant of the fund. The defendant also makes a claim as trustee for his children, on the ground of the language in the policy ("do insure for the benefit of the children of Charles T. Parsons"). On these facts we are of opinion that the trustees was rightly discharged. It is perfectly plain that the contract with the defendant, that "if the said insured [i. e., the defendant] shall survive until the first day of November,

* Opinion filed, October, 1885.

1884, then the said sum insured shall be paid to him," passed to the assignee by the assignment, unless it was held by the defendant in trust, as he contends. The defendant's right, under the contract to have the sum so paid, was "property," within Pub. Stat., chap. 157, § 46, from the moment the contract was made: *Pierce vs. Charter Oak Life Ins. Co.*, 138 Mass., 151. It is true that the promise was to pay in a certain event only. But the event was beyond the control of the promiser, and when, by contract, a party puts his future conduct, as to paying, or not paying, out of his own power, and into that of another, the latter has a present right, in the view of the law, although his enjoyment may depend upon events apart from human will. An opposite view would deprive policies of insurance, or contracts for the carriage and safe delivery of goods, the act of God and the public enemy excepted, of the character of property.

It is objected that the assignee does not rest his claim upon the assignment. The claim reads: "If the amount due was, at the time of the issuing of said special precept of attachment, by the terms of said policy the property of said Charles T. Parsons, and liable to attachments as his estate, that the same belongs to him, the said Crofts, as assignee aforesaid; and he therefore claims the same," etc. Even if the assignee assigned a wrong reason for his claim, his claim is absolute, and the trustee's answer discloses a good reason for it (unless the children are entitled) in the facts which we have mentioned. But we do not read the claim as made on the ground that the fund was liable to attachment at the date of the special precept, being after the assignment, and therefore passed to the assignee. We do not read it as setting forth any ground except what is implied by the allegation that he is assignee. The reference to the liability of the fund to attachment is simply for the purpose of admitting by implication that if it is held to belong to the children, the assignee had no title.

As the trustee must be discharged whether the assignee or the defendant's children has the better right, it is unnecessary to consider whether the children have any interest in the promise which has been discussed, by reason of the earlier words, "Or insure the life of Charles T. Parsons for the benefit of his children," etc.; or whether, by reason of his surviving until Nov. 1, 1884, the contract has ceased to be an insurance, and has become a simple debt to Parsons to his own use.

Trustee discharged.

THE INSURANCE LAW JOURNAL.

VOL. XV.

JUNE, 1886.

No. 6

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

*In Error to the Circuit Court of the United States, Eastern District
of Missouri.*

NEW YORK LIFE INS. CO., *Plaintiff in Error,*

vs.

THOMAS C. FLETCHER, EXECUTOR OF CHINONDA
S. ALFORD, DECEASED.*

The application was a warranty that if the answers were in any respect untrue the policy should be void, and agreed that as the policy was to be issued at the home office where only the written statements were acted on, no representations made by the party soliciting the insurance should be of any binding force unless reduced to writing in the application. Evidence was given that statements regarding the bodily health of the applicant were untrue in a material respect. But it was claimed that the agent was fully notified of all the facts and declared that they were of no consequence, and that further the agent filled in the application, and that the

* Decision rendered, March 29, 1886.

answers were correctly made to him by the insured; an abstract of the application was also appended to the policy, and the attention of the insured was called to it with the request that the company should be informed of any inaccuracies in order that they might be corrected.

Held, That it was the duty of the insured to read the application, and it was error to instruct that if the insured was fraudulently misled by the agent, the company was responsible.

Held, That the retention of the policy by the insured with the abstract of the application appended, was an acceptance of the application which made the holder a participant in any fraud, and the consequences could not afterwards be avoided.

FIELD, J.

The New York Life Insurance Company, on the 22d of December, 1877, issued at its home office in the city of New York to Chionda S. Alford a policy of insurance upon his life for the sum of ten thousand dollars. The consideration was \$263.80 paid at the time, and the promise to pay a like sum on the 22d of December each year. The company is a corporation under the laws of New York, but it also transacts business in Missouri through agents residing there, and, of course, with reference to the business done in that State, is subject to its laws. The assured was a resident of Missouri, and in December, 1877, he applied to an agent of the company there for such a policy, and submitted to an examination. He also made certain statements and representations respecting himself, his life, and his past and present health, to which he appended a declaration, warranting their truthfulness and agreeing that they should be the basis of any contract between him and the company, and that if they, or any of them, were in any respect untrue, the policy which might be issued thereon should be void, and that all moneys paid on account of the insurance should be forfeited; and further agreeing, that, inasmuch as only the officers at the home office had authority to determine whether or not a policy should issue on any application, and as they acted only on the written statements and representations referred to, no statements or representations made or information given to the persons soliciting or taking the application for the policy, should be binding on the company or in any manner affect its rights, unless they were reduced to writing and presented at the home office in the application. The statements and representations with this declaration accompanying the application and forming a part of it, were forwarded to the home office. The policy was thereupon issued and sent to its agent at St. Louis for delivery to the assured. It recited that it was issued in consideration and upon the faith of the statements and represen-

tations contained in his application; all of which had been warranted by him to be true, and also in consideration of the cash payment and the annual premiums to be paid. It stipulated for the payment of the amount of the insurance within sixty days after due notice and satisfactory proof of his death, subject to the conditions specified therein. To the policy was annexed a copy of the application, and upon it was indorsed the following notice in red type and conspicuously printed:—

“For the information of the assured, and in order that any unintentional errors or omissions which hereafter may be found to exist may be corrected, an abstract of the application upon which this policy is based may be found in the third page within. If corrections are desired, when satisfactory to the company, a certificate to that effect will be issued over the signature of the president and actuary.”

The cash payment was made by the assured on the receipt of the policy, and the subsequent annual premiums were regularly paid to the agents of the company in Missouri until his death, which occurred September 24, 1880. The plaintiff was appointed his executor. Due notice and proof of his death were given to the company. Among the documents furnished was the affidavit of a witness, who testified that he had been the physician of the assured for ten years, and had attended him at one time for diabetes, and that he died of that disease. Payment of the insurance money was refused on the alleged ground of false statements and representations in the application. Thereupon the executor brought this action in a court of Missouri, and upon the petition of the company it was removed to the Circuit Court of the United States.

The petition, which is the designation given to the first pleading in an action under the system of procedure in Missouri, alleges the incorporation of the defendant under the laws of New York, and its license to do business in Missouri; the issue of the policy; the payment of the premiums; the death of the assured; the appointment of the plaintiff as executor; the giving of notice and furnishing of proof of the death and the non-payment of the insurance money; and prays for judgment for the amount, with interest. The company answered, admitting its incorporation under the laws of New York, and the issue of the policy, but set up that it was executed at the home office upon the faith of the answers and statements contained in the assured's written application, which were warranted to be true; that it was stated in the application that he never had a

disease of the kidneys or any serious disease, and had never been seriously ill, and had no regular medical attendant, whereas he had been afflicted with diabetes, which is a serious disease of the kidneys, and had been under medical treatment for it; that such statement was not only false, but was material to the risk; that he actually died of the disease which he thus concealed; and that the policy was void by reason of these false statements.

The plaintiff replied that two agents of the company at St. Louis, who were personally acquainted with the assured and knew his past and then physical condition, had solicited him on different occasions to take out a policy in the company; that he told each of them on those occasions that he did not believe he was insurable; that they knew he had been in bad health and had been under medical treatment for diabetes, though he thought he was then well; that they assured him that he was insurable; that the fact that he had had the disease made no difference, and that if he would take out a policy and pay the premiums required he would have no trouble; that finally, about the 18th of December, 1877, he consented to take a policy; that they then told him it would be necessary for him to answer certain questions as a matter of form; that one of them thereupon read to him certain questions from a printed blank, and as he answered them the other pretended to take down and write in the blank the substance of the answers as given, not reading over to the assured what he had written, nor consulting him about it, nor informing him what it was, but saying that what he did was a mere formality; that when he was asked with respect to his having had any disease of the kidneys he replied that his condition was well known to the agents, who were aware that he had been sick and under treatment by Dr. Brokaw for diabetes, and that the doctor's office was opposite, and they could go there and find out everything they wanted to know; that the assured had faithfully answered all the questions, but the agents inserted in the blank false answers; that he had no reason to suppose that the answers were taken down differently from those given; that after answering all their questions he was asked to sign his name to the paper to identify him as the party for whose benefit the policy was to be issued, and for that purpose he signed the paper twice, without reading it or the written answers; that the agents did not read to him any part of the application except the questions, and did not read the clause set forth in the defendant's answer, nor call attention to the fact that his signatures were intended as an acceptance or assent to that

clause; that when the policy was delivered to him he neither read it nor the copy of the application attached to it; that the agent who delivered it informed him that it was all right, and he was insured, and he gave no further attention to the matter; that the annual premiums, as they fell due, were paid to said agent, who received them with full knowledge of all the facts; and that, therefore, the company was estopped from pretending that any of the answers as written rendered the policy void.

The company demurred to this reply, as constituting in law no cause of action and no reply to the facts set forth in the answer, but the demurrer was overruled.

On the trial it was proved by the company that the assured was a resident of St. Louis; and that Dr. Brokaw had been his regular physician for ten years, and had treated him some years before his death for diabetes, of which disease he died.

It was also proved that on the day he made application to the defendant he also applied to the Penn Mutual Life Insurance Company, of Pennsylvania, for insurance on his life, and stated that he had had diabetes in 1875, and that Dr. Brokaw was his physician. That company refused to issue a life policy, but granted a fifteen-year endowment policy at a largely increased premium.

It was also proved that diabetes is commonly known as a disease of the kidneys, though primarily a disease of nutrition and not necessarily affecting their structure in its early stages; that it is a very serious disease and of doubtful curability; that the policy was issued solely upon the written application; and that no other application, statement, or representation was received from the applicant.

The law of Missouri provides that "no misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons shall be deemed material or render the policy void unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury." Rev. Stat. of Mo., sec. 596; and that in suits brought upon life policies "no defense based upon misrepresentation in obtaining or securing the same shall be valid unless the defendant shall, at or before the trial, deposit in court, for the benefit of the plaintiffs, the premiums received on such policies:" *idem*, sec. 597.

Under this last section the defendant tendered in court to the

plaintiff \$888.26, the premiums received, with interest to the date of trial; but the plaintiff declined to receive the amount, in full payment.

On the part of the plaintiff a witness was allowed, against the objection of the defendant, to testify to statements made by the assured and the agent at the time of the application, tending to establish some of the matters alleged in reply to the answer. He could not give the specific words used, but he remembered that in one part of the conversation Alford stood up, at the time he was asked as to his having had kidney disease, and pointed through the window and said: "My medical examiner has an office across the way; you can go there and find out from him. I have been afflicted in the kidneys, but he says I am well, and I feel well now." He also testified that at one time he heard the assured say to the agent: "Your company ought not to insure me; you know I have been afflicted with kidney disease;" and that the agent replied: "Just give me your application and I will see if I can get it through."

The witness was also permitted to testify that he did not think the paper was read over to the assured. He did not hear it read, nor did he remember the questions asked, except the specific one as to the kidneys, and he remembered that because the assured stood up and pointed across the street.

There was no evidence that the application was not read by the assured before signed it, or that there was any imposition practiced upon him, or that after receiving the policy he applied to correct his answers, which, as written down, are conceded to be false.

Upon the conclusion of the testimony, the defendant requested the court to charge the jury, among other things, substantially as follows:

1. That it is competent for any party, corporation, or individual, employing an agent in the negotiation of a contract, whether of insurance or otherwise, to limit his powers, provided the limitation is brought home to the knowledge of the other contracting party, otherwise the principal will be bound by the apparent as well as the actual powers of the agent; and as in this case the limitation was made a part of the contract between the parties, it was binding upon them.

2. That the stipulation between the parties, limiting the powers

of the soliciting agent and providing that the contract should be based upon the written application, was binding upon the parties, and it was, therefore, immaterial what may have been said by or to the agent at the time of making the application, which was not reduced to writing and presented to the officers of the company at the home office in New York.

3. That whether the statements and answers contained in the application of the assured were made by him or not, yet when he afterwards received the policy, with a copy of the application attached and a memorandum indorsed thereon, calling his attention to the copy thus attached, with a request that any errors in the application be reported to the company for correction, it was his duty to report any answers incorrectly written down and thus enable the company to correct them; and that by his failure to do so he must be presumed to have accepted the policy upon the faith of the answers, and to have acquiesced and agreed that it should remain as the basis of the contract of insurance. But the court refused to give any of these instructions, and the defendant excepted. It recognized, however, in its charge, the competency of the company to limit the powers of the agent, and the binding force of the limitation if brought home to the other contracting party, and instructed the jury that there was such limitation in the present case; that the company was not bound by any representations to or by the assured, unless they were put in writing and submitted to the company; that, therefore, what was contained in the application must be regarded as constituting the basis of the contract, unless it could be avoided for fraud; that if the jury found that at the time of making the application he told the agent that he had had diabetes and referred him to his physician concerning it, and that such agent committed a fraud upon the assured by inserting false answers in the application and by suppressing the answers actually given, and by concealing from the assured what he had written in the application, and thereby induced him to sign it without knowing what it contained, then the plaintiff was not estopped to recover. The court also charged that if the assured ascertained before the contract was consummated, that is, before the policy was delivered to him and the first premium paid, that the agent had committed a fraud upon him and upon the company, it was his duty to stop and decline to go any further with the transaction; but if he did not discover this before the policy was delivered and the first

premium paid, he was not called upon afterwards to take any steps for the cancellation of the contract. To this the defendant excepted. The plaintiff obtained a verdict for the full amount of the insurance money with interest, upon which judgment was rendered.

It is conceded that the statements and representations contained in the answers, as written, of the assured to the questions propounded to him in his application, respecting his past and present health, were material to the risk to be assumed by the company, and that the insurance was made upon the faith of them, and upon his agreement accompanying them that, if they were false in any respect, the policy to be issued upon them should be void. It is sought to meet and overcome the force of this conceded fact by proof that he never made the statements and representations to which his name is signed; that he truthfully answered those questions; that false answers written by an agent of the company were inserted in place of those actually given, and were forwarded with the application to the home office; and it is contended that, such proof being made, the plaintiff is not estopped from recovering. But on the assumption that the fact as to the answers was as stated, and that no further obligation rested upon the assured in connection with the policy, it is not easy to perceive how the company can be precluded from setting up their falsity, or how any rights upon the policy ever accrued to him. It is, of course, not necessary to argue that the agent had no authority from the company to falsify the answers, or that the assured could acquire no right by virtue of his falsified answers. Both he and the company were deceived by the fraudulent conduct of the agent. The assured was placed in the position of making false representations in order to secure a valuable contract, which, upon a truthful report of his condition, could not have been obtained. By them the company was imposed upon and induced to enter into the contract. In such a case, assuming that both parties acted in good faith, justice would require that the contract be canceled and the premiums returned. As the present action is not for such a cancellation, the only recovery which the plaintiff could properly have upon the facts he asserts, taken in connection with the limitation upon the powers of the agent, is for the amount of the premiums paid, and to that only would he be entitled by virtue of the statute of Missouri.

But the case as presented by the record is by no means as favorable to him as we have assumed. It was his duty to read the appli-

cation he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions, if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made, or business fairly conducted, if such a rule should prevail; and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others. But here the right is asserted to prove not only that the assured did not make the statements contained in his answers, but that he never read the application, and to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed lines of his application, he would have seen that it stipulated that the rights of the company could in no respect be affected by his verbal statements, or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed.

In *Globe Insurance Co. vs. Wolf*, 95 U. S., 329, the policy declared that the agents of the company were not authorized to waive forfeitures, and this court held that effect must be given to the provision, except so far as the subsequent acts of the company permitted it to be disregarded.

In *Insurance Company vs. Norton*, 96 U. S., 240, the policy contained an express declaration that the agents of the company were not authorized to make, alter, or abrogate contracts, or waive forfeitures, and this court held that the company could have insisted upon those terms had it so chosen.

In *Lochner vs. Home Mutual Insurance Co.*, the Supreme Court of Missouri passed upon this point: 17 Missouri, 256. The charter of that company provided that, if the assured failed to state in his application, which was made a part of the policy, any incumbrance that existed on the insured premises, his policy should be void. There was also indorsed on the policy a memorandum that the company would not be bound by any statement of the agent

unless contained in the application. The answer to the action on the policy set up that the application did not truly state the incumbrances. A small incumbrance upon the premises was not stated, and on the trial evidence was offered that its existence was made known to the agent of the company at the time of the application, but that he refused to write it down, saying the amount was too trifling. The evidence was excluded, and supreme court sustained the ruling, holding that the objection that the incumbrance was not stated could not be obviated in that way. "Independently of the statute of the State," said the court, "which requires the incumbrance to be expressed in the policy at the peril of its being void, there was a memorandum indorsed on it which made known that the company would be bound by no statement made by the agent not contained in the application. The facts being as represented, they could not give the plaintiff a right of action on the policy in the teeth of the statute and against the terms of the contract. If the conduct of the agent was such as is alleged, he was guilty of a gross fraud, as is shown by his setting up this defense, which would avoid the policy and give a right of action for the recovery of the premium, but could not, for the reason given, entitle the plaintiff to to an action on the policy."

The present case is very different from *Insurance Co. vs. Wilkinson*, 13 Wallace, 222, and from *Insurance Co. vs. Mahone*, 21 Wallace, 152. In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. Reference was made to the interested and officious zeal of insurance agents to procure contracts, and to the fact that parties who were induced to take out policies rarely knew anything concerning the company or its officers, but relied upon the agent who had persuaded them to effect insurance, "as the full and complete representative of the company in all that is said or done in making the contract," and the court held that the powers of the agent are *prima facie* co-extensive with the business intrusted to his care, and would not be narrowed by limitations not communicated to the person with whom he dealt. Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, though nominally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such

limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is, therefore, bound by its statements.

The case of *Ryan vs. World Mutual Life Insurance Company* is in some respects similar to the one before us. There a policy obtained on the life of Patrick Ryan for the benefit of his wife declared that it was issued and accepted on the condition and agreement that the statements and declarations made in the application therefor, and on the faith of which it was issued, were in all respects true. The application was a part of the policy. It appeared that when the application was made, he was asked whether he had had any of the following diseases: bronchitis, consumption, spitting of blood, or any serious disease, and the answer, as written, was that he had had "none of them." To the inquiry whether, during the previous seven years, he had had any severe sickness or disease, or had employed or consulted any physician, the answer as written was "no." The authority of the agent was limited to receiving the application, forwarding it to the home office, receiving, countersigning, and delivering the policy, and collecting the premiums. The insured having died, action upon the policy was brought by his widow. On the trial she offered to prove, not that the answers were true, but that different answers were in fact given, both by her and him, and that the answers were wrongly written by the local agent of the company without the knowledge or consent of herself or her husband. The application was signed without being read. It was held that the company was not bound by the policy; that the power of the agent would not be extended to an act done by him in fraud of the company and for the benefit of the insured, especially where it was in the power of the assured, by reasonable diligence, to defeat the fraudulent intent; that the signing of the application without reading it or hearing it read was inexcusable negligence; and that a party is bound to know what he signs. After observing that the courts of the State had construed the powers of an insurance agent liberally, and held that, in writing the application and explaining interrogatories and the meaning of the terms used, he was to be regarded as the agent of the company, and, referring to the case of *Insurance Company vs. Wilkinson*, in 13th Wallace, the court said: "But it cannot be supposed that these defendants intended to clothe this agent with authority to perpetrate a fraud upon themselves.

That he deliberately intended to defraud them is manifest. He well knew that if correct answers were given no policy would issue. Prompted by some motive he sought to obtain a policy by means of false answers. His duty required him not only to write the answers truly as given by the applicant, but also to communicate to his principal any other fact material to the risk which might come to his knowledge from any other source. His conduct in this case was a gross violation of duty, in fraud of his principal, and in the interest of the other party. To hold the principal responsible for his acts, and assist in the consummation of the fraud, would be monstrous injustice. When an agent is apparently acting for his principal, but is really acting for himself or third persons, and against his principal there is no agency in respect to that transaction, at least as between the agent himself, or the person for whom he is really acting, and the principal. The fraud could not be perpetrated by the agent alone. The aid of the plaintiff or the insured, either as an accomplice or as an instrument, was essential. If she was an accomplice, then she participated in the fraud, and the case falls within the principle of *Lewis vs. Phoenix Mutual Life Insurance Co.*, 39 Conn., 100. If she was an instrument she was so because of her own negligence, and that is equally a bar to her right to recover. She says that she and her husband signed the application without reading it and without its being read to them. That of itself was inexcusable negligence. The application contained her agreements and representations in an important contract. When she signed it she was bound to know what she signed. The law requires that the insured shall not only, in good faith, answer all the interrogatories correctly, but shall use reasonable diligence to see that the answers are correctly written. It is for his interest to do so, and the insurer has the right to presume that he will do it. He has it in his power to prevent this species of fraud and the insurer has not." 41 Conn., 168-171, 172. With these views we fully agree.

The instruction given to the jury in the case before us is, in effect, that the assured was bound by his application if it was not avoided for fraud, and that it was so avoided by reason of the false statements contained in it, and that, therefore, the plaintiff, as his representative, could recover. But if the application was avoided, it would seem to be a necessary consequence that the policy itself was also avoided, and his right limited to recovering the premiums paid. But such was not the conclusion of the court. It directed

the jury that if the application was avoided for fraud, he could recover. It does not seem to have occurred to the court that had the answers been truthfully reported, and the fact of the assured having had diabetes within a recent period been thus disclosed, the insurance would in all probability have been refused. If the policy can stand with the application avoided, it must stand upon parol statements not communicated to the company. This, of course, cannot be seriously maintained in the fact of its notice that only statements in writing forwarded to its officers would be considered. A curious result is the outcome of the instruction. If the agents committed no fraud the plaintiff cannot recover, for the answers reported are not true; but if they did commit the imputed fraud he may recover, although, upon the answers actually given, if truly reported, no policy would have issued. Such anomalous conclusions cannot be maintained.

There is another view of this case equally fatal to a recovery. Assuming that the answers of the assured were falsified, as alleged, the fact would be at once disclosed by the copy of the application, annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated not only upon himself but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agents and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and of its statements. The consequences of that approval cannot after his death be avoided.

The court charged the jury that if the assured had discovered the fraud before the policy was delivered and the first premium paid, it would have been his duty to decline to go any further with the transaction; but if he did not discover the fraud until after such delivery and payment, he was not called upon to take any steps for the cancellation of the contract. In other words, the jury were told that the assured might take to himself the benefit of the fraud without responsibility for it, if he did not discover it until after it was consummated—a doctrine without authority and wholly indefensible. No one can claim the benefit of an executory contract fraudulently obtained, after the discovery of the fraud, without approving and sanctioning it.

In *American Insurance Company vs. Nelberger*, 74 Mo., 167, the assured agreed with the agent of the company that the policy to be issued should contain a clause giving him a right to cancel it at

the end of the year. The policy issued contained no such clause; but he retained it several months before he returned it. The court, after observing that when the application does not attempt to set forth all the provisions which the policy to be issued must contain, and the agent represents that the policy will contain certain stipulations which are not unlawful, then the policy must contain them, or the assured would not be bound to accept it. "But in such case," said the court, "it will be the duty of the insured, when he receives the policy, promptly to examine the same, and, if it does not contain the stipulations agreed upon, to at once notify the company of such fact and of his refusal to accept said policy. The policy in this case was issued on the 25th day of January, 1875, and was not rejected by the defendant until May 10, 1875. If the policy was received by the defendant soon after the date on which it purports to have been issued, we think he waited too long to elect whether he would receive the policy without the stipulation in regard to cancellation, or refuse to accept it, because it did not contain such stipulation. After such delay he will be deemed to have accepted the policy as issued."

The case of *Richardson vs. Maine Insurance Company*, 46 Maine, 394, is a stronger one in illustration of this doctrine of acceptance. There an application for insurance was made to an agent of the company. He thereupon filled one containing a statement that there was no mortgage on the property to be insured, and without the knowledge of the applicant signed his name thereto. A policy was accordingly issued, which declared that it was made and accepted in reference to the application, and that the assured, by accepting it, covenanted that the application contained a just, full, and true statement of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured, and that if any fact or circumstance were not fairly represented, the policy should be void. Action having been brought upon the policy, the company denied its liability on the ground that the application had represented that there was no such mortgage, when in fact, one existed. The court held that the assured, by accepting the policy, was bound by its covenants, and that he ratified the application.

It is unnecessary to pursue the subject further. We are clear that the court below erred, both in refusing the instructions asked and in its charge to the jury in the particulars mentioned. Its judgment must, therefore, be reversed, and the cause remanded for a new trial.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

CONNECTICUT MUT. LIFE INS CO., *Appellant*,
 vs.
 JONATHAN YOUNG SCAMMON ET AL.*†

Property owned by a father and two daughters was mortgaged to an insurance company, and pursuant to a stipulation in the mortgage a policy was taken out in the name of the father, and made payable to the mortgagee. Upon the subsequent destruction of the property, the mortgagee entered into an agreement with the father that the insurance money should be deposited in bank and applied to replacing the property. No replacement, however, was made.

Held, That the insurance, though in the name of the father, covered the interests of the daughters, and the company had no right without their consent to apply the proceeds in any other way than that of reducing the mortgage; or if it did so was bound to see that the replacement was made.

Held, In a suit for foreclosure, that the insurance money should be credited on the mortgage.

BLATCHFORD, J.

On the 10th of September, 1866, J. Young Scammon, of Chicago, Illinois, and Florence A. D. Scammon and Arianna E. Scammon, his daughters, were the owners of a lot of land in Chicago, No. 90 Mich-

*Decision rendered, April 12, 1886.

† Connecticut Mutual Life Insurance Company, Appellant, vs. Jonathan Young Scammon, Maria S. Scammon, Florence A. D. Reed, Joseph S. Reed, Arianna E. Scammon, Martin Andrews, Caroline Andrews, Mark Kimball, Assignee, Charles Comstock, First National Bank of Macomb, Illinois, Eiram Wilson, et al.

igan Avenue, known as "lot number five (5), in block number eleven (11), in Fort Dearborn Addition to Chicago," the father being the owner in fee of an equal undivided one-third part of the lot, and having a tenancy for life in the other equal undivided two-third parts, and his two daughters being each the owner in fee of an equal undivided one-third part, subject to such tenancy for life of the father. The lot had descended to the two daughters and a brother of theirs from their mother, subject to the tenancy for life of the father, and he had purchased from the son the fee of his equal undivided one-third part.

On the day above named, Scammon and his daughters executed to the Connecticut Mutual Life Insurance Company, a corporation of Hartford, Connecticut, a mortgage covering the above lot by the above description, to secure the payment of \$30,000, in five years, with semi-annual interest at 8 per cent per annum, according to the condition of a bond which they at the same time executed. The bond stated that it was given for an actual loan of money made by the obligee to the obligors on the day of its date.

The mortgage contained the following covenant on the part of the mortgagors: "And further, that they, their heirs, executors, and administrators, shall and will, at all times hereafter, until said principal sum of money, and all arrearages of interest thereon, shall be fully paid, keep all the buildings (outhouses excepted) now situate, or that hereafter may be erected, upon said premises, fully insured against loss or damage by fire, in some good and responsible insurance company or companies (satisfactory to the said party of the second part, its successor or assigns, or its or their authorized agent), in the fair insurable value of such buildings, and will legally and properly assign and deliver to the said party of the second part, its successors or assigns, each, all, and every, the policies of insurance therefor, as soon as and whenever such insurance shall be effected, and will also deliver to said party of the second part, its successors or assigns, or its or their authorized agent, all premium or renewal certificates received for the payment of the premium upon such policy or policies of insurance, as soon as and whenever such certificates shall be issued; and, in default of so doing, the said party of the second part, its successors or assigns, at its own or their option, may effect such insurance in its or their name or names, or otherwise, and the premium money paid therefor shall be a charge upon said premises, and shall be secured by this instrument in the same manner as the said principal sum of money above men-

tioned is secured, and such premium money shall be paid by said parties of the first part, their heirs and legal representatives, to said party of the second part, its successors or assigns, on demand, and may be collected at any and all times after the same shall have been paid, with interest thereon at the rate of ten per centum per annum from the time the same shall be advanced, and the said party of the second part, its successors or assigns, shall hold each and all such policies of insurance so received, by assignment or otherwise, as collateral and additional security for said principal sum of money and interest, and shall have the right to collect and receive any and all money and sums of money that may at any time become collectible or receivable upon each, all, and every of such policies of insurance, and apply the same, when received, in the same manner, as far as possible, as is hereinafter provided for in case of a sale of said above-described premises under the power of sale hereinafter contained. But nothing herein contained shall be construed as requiring the said party of the second part, its successors or assigns, to incur any expense, or make any effort, to collect any money that may become due on any of such policies of insurance; but, if it or they shall elect not to collect the same, they shall make such election within a reasonable time after such money shall become collectible, and, on demand of said parties of the first part, or their legal representatives, shall thereupon forthwith, after making such election not to collect, re-assign and deliver such policy or policies of insurance to said parties of the first part, their executors, administrators, or assigns."

In the fall of 1867, by an arrangement between Scammon and his daughters, the south one-third part of the lot was conveyed to his appointee by them, in fee, as representing his existing interest in fee in the lot, and the north two-thirds part of the lot was conveyed by him to them as tenants in common, in fee, as representing their existing interest in fee in the lot, subject, as to such north two-thirds part, to the life estate of the father therein. Thereupon, the father and daughters paid or caused to be paid to the mortgagee \$10,000, as a reduction of the principal of the mortgage, and it released, by deed, from the lien of the mortgage, such south one-third of the lot.

With the money lent on the mortgage, Scammon erected a building on the north two-thirds of the lot, and thereafter collected for his own use the rents from it, and paid the interest on the mortgage and the taxes and the fire insurance premiums. Insurance against fire, covering the building, for \$15,000, was effected by Scammon

by a policy issued by the Liverpool & London & Globe Insurance Company in his name, with a clause making the loss payable to the mortgagee. The building was destroyed by fire in October, 1871, and, the loss being adjusted at a sum greater than \$15,000, a draft for \$15,000 was drawn at Chicago, by the agents of the fire insurance company there, on that company at New York payable to the order of the mortgagee. The draft was handed to Scammon and, at his request, the agent of the mortgagee at Chicago sent it to the mortgagee, at Hartford, with an application from Scammon to have the \$15,000 paid to him, to enable him to rebuild the building. Thereupon the following instrument was executed in duplicate by the mortgagee and Scammon, a copy being retained by each:—

“Memorandum of agreement made and entered into this fifth day of January, A. D. 1872, between the Connecticut Mutual Life Insurance Company, a corporation subsisting by the laws of the State of Connecticut, and located and doing business in the city of Hartford, in the State of Connecticut, of the one part, and J. Young Scammon, of the city of Chicago, in the county of Cook and State of Illinois, of the other part, witnesseth: That whereas the said party of the second part did, on the tenth day of September, A. D. 1866, make, execute, and deliver to the said party of the first part a certain indenture of mortgage, bearing date on that day, on the following-described premises, situate and being in the city of Chicago aforesaid, to wit, lot number five (5), in block number eleven (11), in Fort Dearborn Addition to Chicago, for the purpose of securing the payment of the certain bond or obligation of the said party of the second part, bearing even date with said mortgage, in the penal sum of sixty thousand dollars, conditioned for the payment to said party of the first part of the sum of thirty thousand (\$30,000) dollars on the tenth day of September, A. D. 1871, with interest as therein stated, on which said mortgage has been paid ten thousand dollars of principal; and whereas, the building on said premises, known as No. 90 Michigan Avenue, in said city of Chicago, was insured in the following company and in the following amount, to wit, the Liverpool & London & Globe, in the sum of fifteen thousand dollars, which said policy of insurance was held by said party of the first part as collateral security for the payment of said loan, any loss on said policy to be paid to said party of the first part; and whereas said building has been destroyed by fire and the insurance moneys to be received on said policy or policies are subject to be paid to said party of the first part, in ac-

cordance with the conditions of said mortgage; and whereas said party of the second part desires said party of the first part to permit and suffer said insurance money to be used in and upon said mortgaged premises in the reconstruction of said building or buildings thereon, and said first party is willing to have said insurance money so used, upon the terms and conditions hereinafter set forth, and to assist in the collection and receipt thereof by said second party from said fire insurance company or companies for the purposes aforesaid: It is, therefore, mutually agreed by and between the parties hereto, that said party of the first part waives, except as hereinafter provided, its right to apply on the said indebtedness the moneys that may be received on said policy or policies of insurance, and that any and all such sum or sums of money as shall be so collected from said fire insurance company or companies by either of the parties to this instrument shall be deposited in such bank or banks as shall be selected by the party of the second part and assented to by the said first party, to the credit and at the risk of said party of the second part, to be used in the erection of said building or buildings on said mortgaged premises.

The said money shall be paid out and expended in the erection of said building or buildings, from time to time, on the drafts or checks of said party of the second part, countersigned by the said party of the first part, or its duly authorized agent or attorney, until said insurance money is fully expended, as herein provided, on said mortgaged premises. That said drafts or checks shall be so countersigned upon the presentation thereof to said party of the first part, its duly authorized agent or attorney, together with a certificate of a competent and credible architect, that the amount of said check or draft, together with all previous checks or drafts drawn or paid out on said account, has been actually expended in and upon said mortgaged premises, in the permanent improvements thereon, and that the work and material for which the amounts so expended have been paid are fully worth such sum.

If, however, said buildings are being constructed without the supervision of an architect, the affidavit of said party of the second part to said facts may, at the option of said first party, be received in lieu of said architect's certificate. And it is further understood and agreed, that, so soon as said building or buildings shall be in a situation to be insured, said party of the second part shall cause the same to be insured in some good and responsible insurance company, in the fair insurable value thereof, and assign and deliver

the same to said party of the second part, and, as soon as said building shall become so insurable, all the provisions contained in said above-described mortgage shall apply to said insurance, and said conditions are hereby made a part of this agreement.

It is also expressly understood, that any receipt or acknowledgment given by said party of the first part, either alone or jointly with others, to any such insurance company or companies, for the purposes aforesaid of facilitating the collection by said second party of any insurance money intended to be placed back on said mortgaged premises as aforesaid, shall not be construed as a collection of said money by said first party under the conditions of said mortgage, wherein and whereby it is provided that said first party may collect and apply such insurance money upon the indebtedness secured to be paid thereby, but merely as enabling said second party to collect said insurance moneys. Said moneys are not to be so applied, and said mortgage shall remain a lien on said mortgaged premises for the full amount of the principal money mentioned in said bond, with the interest thereon, as if said moneys had never been collected.

It is also further expressly understood and agreed, that said insurance money shall be expended on said mortgaged premises as above provided, with all reasonable and proper dispatch; and that, in the event that, from any cause, whether the death or absence of any party or parties to this agreement, or any other cause, said money shall not have been so expended within six months from the date hereof, then this agreement of waiver shall thereupon become thenceforth null and of no effect, and the right of said second party to use and expend said moneys shall thereupon cease, and said first party shall have the right to draw from the said bank or banks, upon its own check or checks, or that of its authorized agent, said insurance moneys, or so much thereof as shall not then have been actually expended as provided in this agreement, and apply the same in payment pro tanto of the indebtedness secured by said mortgage, and such check or checks of said first party or its agent as aforesaid, drawn at any time after the expiration of six months from the date hereof, shall be a full discharge and acquittance to said bank or banks from any moneys paid thereon.

It is expressly agreed, that time shall be of the essence of this agreement in all its parts, and that said agreement shall be binding upon the heirs, executors, administrators, successors, and assigns of the respective parties."

On the execution of this agreement, the mortgagee indorsed the draft, making it payable to Scammon or his order, and sent it to his agent at Chicago. Scammon signed on the agreement a written designation by him of "the Marine Company of Chicago," a banking institution of which he was then president, as the banking office in which to deposit the \$15,000; and the draft was then delivered by the agent to Scammon, and collected, and its proceeds were deposited to his credit in the Marine Company. The transaction between Scammon and the agent took place at the banking company's office, and the agent exhibited the copy of the agreement to Scammon, as president of the bank. No checks against the money were ever countersigned by or on behalf of the mortgagee, nor was any of it used in putting up any new building on the lot, nor was any such new building put up. Scammon's daughters had no knowledge or information as to any part of the transaction between their father and the mortgagee in regard to the \$15,000.

Under that state of facts, the mortgagee, in June, 1876, filed a bill in equity, in the Circuit Court of the United States for the Northern District of Illinois, for the foreclosure of the mortgage, making as defendants Scammon and the two daughters, and Reed, the husband of one of them, and other persons. The bill credits the payment of the \$10,000, in November, 1876, as one by Scammon and his daughters, in reduction of the principal of the mortgage, and sets forth the release of the south one-third of the lot from the lien of the mortgage, but ignores any credit of the \$15,000, and claims as due \$20,000, with interest at 8 per cent per annum from September 10th, 1873, and moneys paid by the mortgagee for taxes and assessments.

Mrs. Reed and her sister answered the bill. The answer sets forth the transaction in regard to the \$15,000, and avers that it took place without the knowledge, authority, or consent of the daughters, and that the mortgagee, in consenting to the use of the \$15,000 in any other way than in payment of the mortgage indebtedness, relied on the credit of Scammon and released the property of the daughters to that extent. It claims that Scammon's life estate in the north two-thirds part of the lot should be first sold, and the proceeds be applied first in payment of the remaining \$5,000 and interest, and the property of the daughters be thereupon released from all further liability.

After issue, the court referred the cause to a master, to take proofs and report them, with the amount due to the plaintiff. He reported the testimony, and that there was due \$20,000 of principal, and in-

terest from September 10th, 1873, and certain sums paid by the plaintiff for taxes and assessments, with interest thereon. Mrs. Reed and her sister excepted to the report, and the case was heard on the exceptions. The court rendered a decision, 4 Fed. Rep., 263, in which it was ruled (1) that authority in Scammon, as representing his daughters, to make the special agreement in regard to the \$15,000, could not be implied from the general power he exercised over the property, in managing it, and procuring insurance and paying taxes, the daughters having themselves executed the mortgage; (2) that the insurance was obtained in pursuance of the requirements of the mortgage, and must be presumed to have covered the interests of all the mortgagors as an entirety; (3) that the mortgagee in fact dealt with the \$15,000 not as Scammon's money, but as representing a further security furnished under the mortgage, and as something which concerned the rights of all the mortgagors, because the agreement it made with Scammon recognized its obligation either to credit the \$15,000 on the mortgage or to see that it went to restore the building; (4) that the provision of the policy, that the loss should be payable to the mortgagee, placed it in the same position towards all the mortgagors as if the policy had been taken out in the names of all, and assigned to the mortgagee, and it was bound to apply the \$15,000, in accordance with the provisions of the mortgage, for the benefit of all the mortgagors, unless all consented to a different disposition of the money; (5) that, in any view, if the agreement with Scammon was valid, as against the daughters, the mortgagee was bound to see that the money was used to restore the building, or else credit it on the mortgage.

Under these views, the court referred the case back to the master, with directions to restate the account according to the principles thus laid down. He did so, and, the case being heard on his report, the court on the 2d of October, 1882, rendered a decree, which, after setting forth the material facts above stated, contains the following clauses:—

"The court further finds, that, when the complainant originally took the same mortgage, it, by its agent, knew the state of the title of the mortgaged premises; that, in the erection of the building on said premises, and causing it to be insured, and in collecting rents and paying the insurance premiums and taxes, the defendant, J. Y. Scammon held the property as if it was his own; that the entire business connected with the loan from the complainant, from the

time of its original negotiations down to the time of the before-mentioned agreement in relation to the insurance, was transacted by J. Y. Scammon, who kept an account of the property in his bank ledger, in which rents by him received were credited, and the monies paid out were also entered; that the defendants, Florence A. D. Reed and Arianna E. Scammon knew nothing, at the time, of the insurance obtained upon the property, nor anything in relation to the agreement between their father and the complainant made in 1872; that the complainant entered into the agreement for the payment of the insurance money to Scammon, to be by him used in rebuilding, in good faith; and that said Scammon received it in good faith for that purpose, and the officers of the bank where it was deposited understood that the money was deposited there as a special deposit, subject to said agreement.

The court further finds, that Florence A. D. Reed and Arianna E. Scammon did not know that this insurance had been effected on the property, or of the payment of premiums thereon, and were never consulted about the disposition of the insurance money, and had no knowledge of, and gave no consent to, its payment to their father and its deposit in the bank, and have never asserted any rights in relation thereto until the commencement of this suit.

The court further finds, that the acts of Florence A. D. Reed and Arianna E. Scammon were limited to the execution of the bond and mortgage and the making of the agreement for partition; that said insurance was furnished under the covenants of the mortgage, and pursuant to the requirements thereof, and was an additional security held by the complainant for the payment of the principal sum and interest secured by said mortgage, and that the covenants in the mortgage for insurance operated as an assignment of the insurance fund, when collected, to the mortgagee; that the acts of the complainant, its receipt of the draft for said insurance money, and its indorsement thereof to the defendant, J. Y. Scammon, by ordinary commercial indorsement, and its assumed control over the ultimate destiny and use of the proceeds thereof, were equivalent to a collection of the insurance by the complainant; that the receipt by the complainant of said insurance money operated as a satisfaction pro tanto of said mortgage, so far as the estate and interests of the defendants, Florence A. D. Reed and Arianna E. Scammon are involved, but that, so far as the life estate of J. Young Scammon is concerned, said mortgage remains an equitable lien and incumbrance for the full amount thereof."

The decree then goes on to declare that there is due, at its date, from Scammon to the plaintiff, on the bond and mortgage, \$20,000 of principal, and \$13,093.32 of interest, as reported, and \$1,404.44 for interest since the date of the report; and \$3,275.42 for moneys paid for taxes and to redeem from tax sales, and \$490.73 for interest thereon, as reported, and \$287.51 for interest since the date of the report; being, in all, \$38,551.42; that the sum is a valid and first lien on the estate of Scammon, for his life, in the north two-thirds of the lot (excepting therefrom a strip from off its north side, hereafter mentioned); that, of the \$38,551.42, Mrs. Reed and her sister are personally liable for \$5,000 of principal, and \$3,273.33 interest thereon, as reported, and \$351.11 interest on the \$5,000 since the date of the report, and for the above-named sums of \$3,275.42, \$490.73, and \$287.51, being in all \$12,678.10, which is a valid and first lien on the estate in remainder of them and each of them, after the expiration of the life estate of Scammon, in the north two-thirds of the lot (excepting therefrom the strip above referred to); and that the \$12,678.10 is a valid and first lien on said strip. The decree then provides for the sale at public auction of such estate in remainder, excepting the strip, and of such life estate excepting the strip, and of the strip, each separately; and directs that the proceeds of the life estate be applied first to the satisfaction of the amount for the payment of which the life estate is decreed to be the sole security, and that no portion of the amount realized from the sale of the life estate shall be applied to pay the costs of the suit, or any moneys found due for taxes, or on account of that part of the principal or interest of the bond for which there is other security, until the sum for which the life estate is the sole security shall have been fully paid. From this decree the plaintiff appealed to this court.

The plaintiff assigns for error that the circuit court erred in giving the daughters credit for the \$15,000. But we are of opinion that the views of that court in its decision, as above set forth, and as embodied in the decree, were correct.

The policy of insurance was a collateral security for the joint debt of the mortgagors, furnished in compliance with the provisions of the mortgage, and the mortgagee was bound to apply the insurance money to the payment of the joint debt, according to the terms of the mortgage. In the agreement with Scammon, of January 5th, 1872, the mortgagee declares that it held the policy as "collateral security for the payment" of the loan secured by the mortgage, and that the \$15,000 is subject to be paid to it "in accordance with the

conditions" of the mortgage. Although the policy was taken out in the name of Scammon, it was, under the mortgage, a part of the security covenanted for therein; and must be treated as having been furnished by, and for the benefit of, all the mortgagors. The insurance was on the building as a whole, and not on any particular interest in it, and was accepted and treated by the mortgagee as an insurance complying with the terms of the mortgage, and covering all the interests which the mortgage covered.

The mortgagee could not, without the consent of the daughters, surrender the proceeds of the collateral security to Scammon, or divert them from the purpose to which the mortgage devoted them. And, in any event, the mortgagee, if at liberty to use the money toward restoring the building, was bound to see that it was so applied, and took the risk of the diversion. The money not having been so applied, it must be credited in favor of the daughters. Their intention, declared by the mortgage, that the money should be credited on the mortgage, was never varied by them.

Three persons named Andrews, and the wives of two of them, were defendants to the bill. It alleged they had interests in the mortgaged lot subordinate to the lien of the mortgage. They answered the bill, setting up a prior lien in favor of the three, because they had erected a party wall on and along the north line of the lot, under a party-wall agreement made prior to the mortgage, and of which the mortgagee at all times had notice; and alleging that, if the mortgage was superior in lien, then the residue of the lot, not covered by the party wall, should be first sold to satisfy the mortgage. Issue was joined on the answer. In the taking of proofs, the plaintiff put in evidence a party-wall agreement made June 4th, 1866, between Scammon and one Smith, by which it appears that Smith owned lot 4, next north of lot 5, and gave permission to Scammon to build one-half of the north wall of a building he was to erect on lot 5, to the northward of the dividing line between the two lots, and that Smith, on paying to Scammon one-half of the value of the wall, was to be entitled to use the north half of it as a party wall. On the 25th of February, 1867, Scammon and his daughters and Smith executed a supplemental paper, stating that the contemplated wall had been erected, and agreeing that such wall was to be considered as built on the dividing line between lots 4 and 5, and that the center of such wall was such dividing line. There is not, in the record, any other testimony about any party wall or the strip of land, and none to support the Andrews answer, and there is no men-

tion of the strip in either of the reports of the master. The decree, however, finds that the three Andrews defendants own in fee, subject to the lien of the mortgage, by title derived from Scammon and his two daughters, the strip of land before referred to, describing it as a strip from off the north side of lot 5, $\frac{1}{4}$ inches wide in front, and $9\frac{1}{4}$ inches in the rear, and the depth of the lot. It also excepts that strip in declaring that the mortgage is a first lien on the life estate of Scammon in the north two-thirds of the lot, and in declaring that it is a first lien on the estate in remainder of the daughters therein, and declares that the \$12,678.10 is a valid and first lien on that strip, and excepts the strip from the estate in remainder, and from the life estate, in describing the premises to be sold, and directs it to be sold by itself, after those estates are sold.

The appellant objects to the adjudication in regard to the strip, on the ground that there is not in the record either pleading or evidence to support it. This is true. The decree must, therefore, be reversed in that respect. It is accordingly affirmed, except as to the strip, and reversed as to that, and the case is remanded to the circuit court, with a direction to strike out of the decree everything relating to the strip. The costs of the appeal are awarded to the daughters

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

*In Error to the Circuit Court of the United States, for the Eastern
District of New York.*

MUTUAL LIFE INS. CO. OF NEW YORK,
Plaintiff in Error,

vs.

JULIA ARMSTRONG, ADMINISTRATRIX OF
JOHN M. ARMSTRONG, DECEASED.*

At the solicitation of H., who paid the premiums and took an assignment of the policy, an endowment policy was issued on the life of A., payable to A. or his assigns after its maturity, or to his legal representatives in case of previous death. H. was shortly afterwards convicted upon the charge of murdering A.

Held, That in a suit by the legal representatives of A. to recover on the policy, it was error to charge that evidence of fraud on the part of H. was inadmissible on the ground that H. had no legal interest in the policy until its maturity, the assignment applied to a claim arising prior as well as subsequent to its maturity.

Held, That evidence was admissible in support of fraud, showing that H. took out similar policies in other companies about the same time.

Held, That the murder committed by H. defeated all recovery on the policy.

FIELD, J.

On the 8th of December, 1877, the Mutual Life Insurance Company of New York, issued a policy of insurance on the life of John M. Armstrong, of Philadelphia, for ten thousand dollars. It was what is known as an endowment policy; that is, a policy payable to the assured if he live a designated time, but to some other person

* Decision rendered, April 5, 1886.

named if he die before the expiration of that time. It was payable, subject to certain conditions, to the assured or his assigns on the 8th of December, 1897, at the office of the company in New York; or, if he should die before that time, to his legal representatives, within sixty days after notice and proof of his death. It recited that it was issued in consideration of his application, and of the statements contained therein, which, whether written by his own hand or not, every person accepting or acquiring any interest in the contract adopted and warranted to be true, and the only statements upon which the contract was made; and in further consideration of the payment of \$138.60 quarterly each year during the continuance of the policy.

On the 25th of January, 1878, Armstrong died, and his widow was appointed administratrix of his estate. The required notice and proof of his death were furnished, and the insurance money not being paid, she brought this action for its recovery in a court of the State of New York, and, on motion of the company, it was removed to the Circuit Court of the United States.

The company set up several special defenses to the action. One of them was, that the policy was obtained by one Benjamin Hunter, with the intent to cheat and defraud the company by compassing the death of the assured by felonious means and collecting the amount of the insurance, and which he attempted to carry out by causing his death; another was, that the statements made in the application of the assured as to previous insurances upon his life were false, the amounts being much larger than those stated.

On the trial it appeared in evidence that on the 3d or 4th of December, 1877, Hunter made some inquiries at the office of the company in Philadelphia as to the rates of insurance on the life of a person aged forty or forty-one years upon an endowment policy of twenty years, stating that he thought of insuring for his own benefit the life of a person in the sum of \$10,000. After some conversation on the subject of insurance generally, he left, stating that the person to be insured would probably call in a day or two. On the 5th of the month Armstrong called, and informed the agent that he came at the request of Hunter to make application for a life insurance. He was thereupon examined, and after answering the questions usually propounded to applicants, and among others those in relation to existing insurances on his life, he signed a formal application, leaving, however, blank the place for the amount of the insurance which he desired, and for the answer to the question touching the

payments of the premium. He also executed an assignment of the policy, leaving blanks for its date and for that of the policy, and for the name and residence of the assignee. This was his entire connection with the transaction. In the afternoon of the same day, or on the following morning, Hunter informed the office that the amount of the insurance desired was \$10,000, and that it would be more convenient for him to pay the premiums quarterly. The term "quarterly" and the sum "\$10,000" were, therefore, upon his instructions, inserted in the application. The policy, filled up in accordance with them, was then sent to New York to be there executed by the company. Before its return he visited the office, and stated that, as he intended to leave the city and be absent for some time, he would pay the premium, and that his lawyer would call for the policy. He accordingly paid the stipulated premium, and the fee for the policy. Some days afterwards his lawyer received the policy and also the assignment, which was attached, the blanks having been filled. They were subsequently delivered to Hunter, and were found in his possession at his death.

Within six weeks after the policy was issued Armstrong was attacked at night in a street in Camden, New Jersey, and received blows on his head which fractured his skull, from the effects of which he died two days afterwards. Suspicion fell upon Hunter as the perpetrator or instigator of the attack. He was accordingly arrested, and was indicted and tried for the murder of Armstrong in one of the courts of that State, and was convicted. He was sentenced to death and was hanged. By stipulation the testimony of any living witness might be read from the record of his testimony in that case, with like effect as if he were present and testified in this action, subject to all legal objections to its relevancy, competency and materiality. As the first step in proof of the defense that the policy was obtained to cheat and defraud the company, the defendant offered to read from that record the testimony of a witness to show that Hunter, being at the time the sole owner of the policy, intentionally caused the death of Armstrong; but the court, upon objection of the plaintiff, excluded the testimony, and an exception was taken. The defendant offered in different forms to make this proof, but the court refused to receive it, accompanying its ruling in one instance with this statement to counsel: "I will take your offer as broad as you choose to make it; that you offer the testimony to prove that Hunter procured the application for the policy on Armstrong to be made, and that he did so for the purpose of having the

insurance effected, and then disposing of Armstrong, and then getting the money; make it as broad as that, and I will exclude it."

The defendant also offered to prove that, about the time the policy in suit was issued, Hunter, with like fraudulent intent, obtained policies of insurance in two other companies upon the life of Armstrong, one made directly to himself, and the other to Armstrong, with an assignment executed simultaneously to himself, and that he paid the premiums thereon; one of the policies being for ten thousand dollars and the other for six thousand dollars; but upon the objection of the plaintiff the testimony was excluded, and an exception taken.

The court, among other things, instructed the jury, in substance, that the contract of insurance was divisible; that the last part, providing for the payment of the insurance money to the legal representatives of Armstrong in case he should die before the expiration of the policy, was not assignable; that his assignment only transferred the interest, payable at the expiration of the policy; and that the plaintiff was his legal representative, entitled to the policy and to whatever was due upon it. The defendant excepted. A verdict for the full amount of the policy, with interest, was rendered, and judgment entered thereon.

From the charge of the court, and its opinion on the motion for a new trial, 20 Blatchford, 493, it appears that the refusal to admit testimony of Hunter's fraudulent purpose in procuring the policy, and his feloniously causing, whilst the sole owner of it, the death of the assured, was founded upon the assumption that the insurance money, payable in case the death occurred before the expiration of the policy, went to the legal representatives of the assured, and was not assignable, and that the assignment not taking effect, Hunter had no interest in the policy, and therefore, if he did feloniously cause the death, the fact could have had no effect in controlling the payment.

Assuming this to be the reason for excluding the evidence offered, the ruling cannot be upheld. The position that the assignment did not take effect because the assured died before the expiration of the policy is untenable. The provision for payment in such case to his legal representatives was intended to meet the contingency of his dying without having disposed of his interest, and not to limit his power over the contract during his life, and pass the insurance to those who should represent him after his death. The term "legal representatives" is not necessarily restricted to the personal representatives of one deceased, but is sufficiently broad to cover all per-

sons who, with respect to his property, stand in his place and represent his interests, whether transferred to them by his act or by operation of law. It may, in this case, include assigns as well as executors and administrators: *New York Life Insurance Company vs. Flack*, 3 Md., 341.

A policy of life insurance, without restrictive words, is assignable by the assured for a valuable consideration equally with any other chose in action, where the assignment is not made to cover a mere speculative risk, and thus evade the law against wager policies; and payment thereof may be enforced for the benefit of the assignee, and, under the system of procedure in many States, in his name: *Warnock vs. Davis*, 104 U. S., 775, 780; *Archibald vs. Mutual Ins. Co. of Chicago*, 38 Wis., 542, 545; *De Rouge vs. Elliott*, 7 N. J. Eq., 487, 495. The assignee here, Hunter, represented that he was the special partner of Armstrong, and had placed five thousand dollars in the partnership, and was apprehensive that he might be charged as a general partner. If he was a special partner the contract was not a wager policy. And as it was not a contract for the benefit of the wife of the assured, it does not fall within those cases where, for the protection of the beneficiary, the power of the assured to divert the course of payment is restricted.

The assignment conveying to Hunter the whole interest of the assured, his representatives alone would have a valid claim under it, if the policy were not void in its inception. Proof, therefore, that he caused the death of the assured by felonious means must necessarily have defeated a recovery; and the court erred in refusing to admit testimony tending to prove that such was the fact.

The theory of the defense is, that the purpose of Hunter in obtaining the insurance was to cheat and defraud the company. In support of that position evidence that he effected insurances upon the life of Armstrong in other companies at or about the same time, for a like fraudulent purpose, was admissible. A repetition of acts of the same character naturally indicates the same purpose in all of them; and if when considered together they cannot be reasonably explained without ascribing a particular motive to the perpetrator, such motive will be considered as prompting each act. A creditor has an insurable interest in the life of his debtor, and may very properly procure an insurance upon it for an amount sufficient to secure his debt, but if he takes out policies in different companies at or nearly the same time, and thus increases the insurance far beyond any reasonable security for the debt, an inquiry at

once arises as to his motive, and it may be considered as governing him in each insurance. In *Castle vs. Bullard*, 23 Howard, 173, where the defendants were charged with having fraudulently sold the goods of the plaintiff, evidence that they had committed similar fraudulent acts at or about the same time was allowed, with a view to establish their alleged intent with respect to the matters in issue. The court said: "Similar fraudulent acts are admissible in cases of this description if committed at or about the same time, and when the same motive may reasonably be supposed to exist, with a view to establish the intent of the defendant in respect to the matters charged against him in the declaration." In *Lincoln vs. Claffin*, 7 Wallace, 132, an action was brought for fraudulently obtaining property, and evidence of other frauds of a like character, committed by the defendants at or near the same time, was held to be admissible. "Its admissibility," said the court, "is placed on the ground that where transactions of a similar character executed by the same parties are closely connected in time, the inference is reasonable that they proceed from the same motive. The principle is asserted in *Cary vs. Hotaling*, 1 Hill, and is sustained by numerous authorities. The case of fraud, as there stated, is among the few exceptions to the general rule that other offenses of the accused are not relevant to establish the main charge." In *Butler vs. Watkins*, 13 Wall., 456, 464, speaking on the same subject, this court said: "In actions for fraud large latitude is always given to the admission of evidence. If a motive exist prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another, at or about the same time and in relation to a like subject, was actuated by the same spirit." In *Bottomley vs. United States*, 1 Story, 135, Mr. Justice Story held the same doctrine, and cited several instances of its application. Thus, in the case of a prosecution for uttering counterfeit money, the fact that the prisoner has in his possession, or has uttered, other counterfeit money, is held to be proper evidence to show his guilty knowledge; and upon an indictment for receiving stolen goods, evidence that the prisoner had received at various other times different parcels of goods which had been stolen from the same persons is held admissible in proof of his guilty knowledge. So, on an indictment for a conspiracy to create public discontent and disaffection, proof is admissible against the prisoner that at another meeting held for an object

professedly similar, at which the prisoner was chairman, resolutions were passed of a character to create such discontent and disaffection. "In short," said the learned justice, "wherever the intent or guilty knowledge of a party is a material ingredient in the issue of a cause, these collateral facts, tending to establish such intent or knowledge, are proper evidence. In many cases of fraud it would be otherwise impossible satisfactorily to establish the true nature and character of the act." Many other authorities might be cited to the same purport.

The evidence offered that Hunter obtained insurances in other companies on the life of Armstrong at or near the same time, was, under these authorities, clearly admissible. It tended to establish the theory of the defendant that the insurance in this case was obtained by Hunter upon the premeditated purpose to cheat and defraud the company. Especially would it have had that effect if followed by proof of the manner of the death of Armstrong.

But, independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had willfully fired.

This view renders it unnecessary to consider the effect upon the policy of the statements made in the application of the assured as to the amount of other insurances on his life.

Judgment reversed, and cause remanded for a new trial.

Mr. Justice Matthews did not sit in this case nor take part in its decision.

COURT OF APPEALS OF NEW YORK.

MARY FRANK. *Respondent*,

vs.

MUT. LIFE INS. CO. OF NEW YORK AND
GEORGE W. DEMOND, *Appellants*.*

A policy taken out by a wife on the life of her husband in New York, is not assignable, no matter who paid the premiums. It cannot be claimed that because the premiums were paid by the wife out of her separate fund and because no reference is made to the statute, therefore such a policy is assignable at common law.

The wife's policy having lapsed according to its terms for non-payment of premium, she secures no greater rights against the company through having illegally assigned it, and its subsequent surrender by the assignee.

Where it is claimed that a wife's policy was assigned as collateral for a loan to the husband, and that the assignee surrendered it to the company which thereupon paid a surrender value and canceled it, and that the wife had no power to assign, and that the wife is entitled to the same advantage as if she had never assigned; she cannot recover on the ground of an unlawful conversion.

Held, that the possession of the assignee was lawful until the wife elected to reclaim, and its receipt by the company from the assignee was not a conversion. The rights of the wife failed solely through neglect to tender the premium when due.

Held, That the wife was entitled to recover from the assignee the surrender value received by him less the premiums paid by him, with interest.

RAPALLO, J.

We are of opinion that the policy issued by the defendant company to the plaintiff on the life of her husband, on the 21st of January, 1869, was, under the decision of this court in *Brummer vs. Cohn* (86 N. Y. 11), and preceding cases therein referred to, not assignable by her, and that she had the right to avoid the assignment made by

* Decision rendered, April, 1886.

her to Martin Kupfer on the 16th of September, 1875. That consequently the subsequent assignment made by Kupfer, with her consent on the 17th of August, 1876, to the defendant Demond, and the surrender by him to the company on the 9th of January, 1877, were not binding upon her.

The learned counsel for the insurance company contended that the policy was not taken out under the act of 1840 and was not within the decisions holding such policies to be non-assignable, for the reasons that the contract of insurance was with the wife, and that she paid the first premium, as appears from the recital in the policy, and that the husband paid none of the premiums out of his own funds.

There is no finding that the premiums, subsequent to the first, were paid by the wife or that they were not paid by the husband, nor was there any request to find such facts. The only finding with respect to who paid the premiums, other than the last two paid, is that the policy was issued to the plaintiff in consideration of the sum of \$178.50, duly paid to the company by the plaintiff, and of the quarter annual payment of a like amount on certain days during the continuance of the policy.

The only evidence on that point on the trial, in addition to the recital in the policy, was the testimony of the plaintiff's husband, who stated that he paid the premiums himself for his wife up to April, 1876; but on cross-examination he said he could not recollect whether or not they were paid by the wife's father out of his own money. The premiums due in July and October, 1876, are found to have been paid by the defendant Demond.

The act of 1840, Chap. 80, is not confined to cases where the premiums are paid by or out of the funds of the husband. As originally enacted it authorized any married woman to cause to be insured, for her sole use, the life of her husband, and provided that the amount of insurance when due should be payable to her free from the claims of the representatives of the husband or of any of his creditors; but that such exemption should not apply where the amount of premium annually paid should exceed three hundred dollars. But by the act of 1858, Chap. 187, this condition of the exemption was confined to cases where the premium exceeding \$300 was paid "out of the funds or property of the husband," clearly implying that the act contemplated their being paid from some other source; and by the act of 1877, Chap. 277, the condition was further modified so as to provide merely that where the amount

of premium paid out of the funds or property of the husband should exceed \$500, the excess should inure to the benefit of the creditors of the husband. In *Eadie vs. Slimmon* (36 N. Y., 9) the leading case upon this subject, and in most of the cases which have followed it, the same feature appears to which the counsel refer as taking the present case out of the principle of those cases. The policy in *Eadie vs. Slimmon* recited the payment by the wife of the premium for the first year, and that recital does not appear to have been controverted in any manner, and in none of the cases in this court is the question whether the premium was paid by the husband or the wife treated as material.

In *Wilson vs. Lawrence* (8 Hun, 593; s. c., 13 Hun, 241) it was deemed by the supreme court material to inquire by whom the premiums were paid. The policy contained the same recital, and so far as appeared when the case first came before the court at general term (8 Hun, 593) the wife had paid the premiums. On this ground the court held that the policy, being valued at common law was not issued under the statute, and that her assignment of it to the plaintiff was good to the extent of securing the repayment to her assignee of the sum paid by him on the assignment. On a new trial it was proved and found, notwithstanding the recital in the policy of the payment of the first premium by the wife, that in fact all the premiums had been paid by the husband, and on that ground the policy was held to be non-assignable (s. c., 13 Hun, 241). The judgment was affirmed in this court (s. c., 76 N. Y., 595); but the supposed distinction was not considered here.

The argument of counsel is that inasmuch as at common law the wife had an insurable interest in the life of her husband (a point which had not been decided by this court at the time of the decision in *Eadie vs. Slimmon*, an insurance thereon for her benefit, where the premiums were paid out of her separate estate, by her or her trustee, would be valid, and would be protected against the creditors of the husband independently of the statute. Therefore, that in such a case a policy taken out by her, especially where, as in this case, it contained no reference to the statute, was not taken out under the statute and was assignable by her.

We think the court has gone too far in the other direction to justify it in establishing this distinction now. The rule that such policies were not assignable was not derived from any provision of the statute, but was established by the decisions of the court and

has been steadily adhered to. In the case in which it was first promulgated, *Eadie vs. Slimmon* (26 N. Y., 9), the case discloses, as has already been stated, that the contract of the company was with the wife and the first premium was paid by her, and the decision has been followed in many subsequent cases. In 1873 the doctrine of those cases was recognized by the legislature by conferring upon married women the power to assign their policies, when they had no children, on complying with certain formalities (Laws of 1873, Chap. 341), and in 1879 full power to assign was conferred upon them without those conditions, provided the husband consented to the assignment (Laws of 1879, Chap. 248). We are not disposed at this late date to introduce the distinction claimed, although it is sustained by forcible arguments.

It is further argued that inasmuch as it has been decided by this court in *Smilie vs. Quinn* (90 N. Y., 492) that a policy taken out by a wife on the life of her husband, is not liable even for the debts of the wife, and the amount of premiums which may be paid otherwise than out of the funds of the husband, is unlimited, a married woman having property might place such property beyond the reach of her own creditors by investing it in effecting insurance to an extravagant amount on the life her husband. It seems from the report of the case of *Smilie vs. Quinn* in the supreme court (25 Hun, 334) that it was found as a fact that the premiums were paid with the funds of the husband, and that fact was made one of the grounds upon which the court held the proceeds of the policy not liable for the debts of the wife. In this court (s. c. 90 N. Y., 792) that circumstance is not relied upon, and the decision is placed upon the grounds that the wife alone had the right to avoid the assignment and reclaim the policy, and that she could not be compelled to do so, and that a receiver appointed in a proceeding instituted by her judgment creditors had no such right. It was also held in that case that her assignment was not fraudulent as against her judgment creditors under the circumstances of that case. But should such a case arise as is supposed in the argument of counsel, it would present questions which are not concluded by the decision in *Smilie vs. Quinn*, and which are not presented in the case now before us. It is sufficient to say that the non-assignability of such a policy, at the time the assignment now in controversy was made, did not depend upon the question whether the premiums were paid by the husband or by the wife or by a third person. Since then all such policies have

been made assignable by the wife with 'the consent of the husband (Laws of 1879, Chap. 248.)

But although we hold that the plaintiff was protected by the principal established in *Eadie vs. Slimmon* and subsequent cases and that the result was that she had the right to avoid her assignment and reclaim her policy, as is held in *Smilie vs. Quinn* (90 N. Y., 492), it does not follow that she has established in this case any right of action against the defendant, the insurance company. She certainly cannot claim under the policy, for she has failed to perform its conditions. This was held by the court below and as we think correctly. The condition of the policy was that if the premiums thereon should not be paid when due, the policy should cease and determine. It is found by the trial court that the premium falling due on the 21st of January, 1877, was not, nor was any subsequent premium paid to the company, and on the 21st of January, 1877, the policy and all the right of the plaintiff therein became lapsed and forfeited, and all payments thereon became forfeited to the company. It is also found that the thirty days' notice required by Chapter 341 of the Laws of 1876, had been given by the company to the plaintiff. These facts preclude any recovery by her on the policy. As between her and the company she was placed in no better position in this respect by her assignment of the policy and its surrender by her assignee, than she would have been in if she had retained the policy. She had the right to avoid her assignment and reclaim her policy, and if he had tendered the premium to the company it would have been its duty to accept it. Nothing had been done to prevent that course being pursued. The fact is found that when the policy was surrendered to the company by the defendant Demond, the company attached to it his receipt for the sum paid him and stamped on the back of the policy the words "Paid, January 9, 1877," and has ever since retained possession of the policy so canceled. There was nothing in all this which prevented the plaintiff, had she desired to avoid her assignment, from so notifying the company and paying or tendering the premiums as they fell due, and, in the absence of such tender it is not to be presumed that the company would have refused to accept them.

On these grounds the court below held that the plaintiff was not entitled to require the company to issue a paid-up policy pursuant to the provisions of the original policy, but found as a conclusion of law that the plaintiff was entitled to recover both of the company and Demond, the sum of \$2,979.42 with interest, less \$357 for pre-

miums paid by Demond, the balance being the amount paid by the company to Demond on the 9th of January, 1877, when he surrendered the policy.

In the conclusions of law set forth in the decision of the court the ground of this recovery is not stated. There is no finding of the conversion of the policy by either Demond or the company, nor is there any finding or any allegation in the complaint, or any proof, that it was ever demanded of either. The finding is that no demand was made of Demond. But in the opinion of the learned trial judge he states that he holds the facts to be sufficient to render the defendant liable for a conversion of the plaintiff's property.

The complaint, after setting forth the policy and the assignments from the plaintiff to Kupfer as collateral security for a loan from him to the plaintiff's husband and the assignment from Kupfer to the defendant Demond, alleges that Demond in some manner unknown to the plaintiff delivered up the policy to the company, who thereupon paid him therefor the sum of \$2,970.42, and canceled the policy and has ever since retained possession of the same so canceled. That the policy was not assignable by the plaintiff, who had no power to assign the same, and in law she was still entitled to the same, and all benefit and advantage thereof as if she had never assigned the same to any one, and she demanded as relief judgment against the defendant for the sum of \$5,333, or whatever sum might be the surrender value of the policy with interest from January 9, 1877, or that the company be adjudged to issue to her a paid-up policy as provided in the original policy.

Under this complaint, which sets forth a cause of action *ex contractu*, it is difficult to see how a recovery can be had for a cause of action *ex delicto*, or how in the face of the claim that the plaintiff is still entitled to the same benefit and advantage from the policy as if she had never assigned it, she can recover on the ground that either of the defendants has converted it.

But so far as the defendant, the insurance company, is concerned there are further insuperable difficulties in the way of sustaining an action for conversion. In the first place the possession of the policy by the defendant Demond was lawful until the plaintiff elected to avoid her assignment and reclaim her policy, and, until she did so reclaim it, neither of the parties was guilty of a wrong in holding it, and further, what was done by the company did not amount to a conversion. The mere receipt of the policy from Demond, who

stood in the place of her assignee, and the payment to him of the surrender value and marking the policy canceled, before any election on her part to avoid the assignment, and retaining the policy in their possession, was no violation of her rights and did not impair them, as she herself avers in her complaint, in which she states that the policy is still in the possession of the company and that she is entitled to the same benefit and advantage thereof as if she had never assigned it. The loss of her claim against the company is due, not to the surrender of the policy, or its cancellation, but to her failure to keep it alive by the payment of premiums, and this failure was in no manner attributable to the acts either of Demand or of the company.

It is in this respect that the present case differs decisively from *Whitehead vs. N. Y. Mutual Ins. Co.*, recently decided. In that case we held that the non-payment of the premiums after the surrender of the policy was occasioned in part by the wrongful act of the company in accepting a surrender from one having no authority to represent the assured, and that the insurance company participated with the husband in keeping the wife and children in ignorance of their rights. In the present case accepting the surrender was not, as we have said, a wrong to the plaintiff, nor was she in any measure kept in ignorance of her rights or prevented by any act of the company from continuing her payments; nor had the company, in the case last cited, given to the assured the notice required by the act of 1876, Chap. 341, and which was essential to entitle it to terminate the policy.

In the recent case of *Martin vs. Tradesmen's Ins. Co.* decided, we held that where an insurance company had issued a policy to M. and K. upon a steamboat, loss payable to the H. & H. Company who were mortgagees, and afterwards at the request of a third person, presumed to represent the mortgagees, the company altered the policy by drawing a line through the names of M. and K. and interlining in their place the name of J. G. as the assured, and interlining after the names of the mortgagees the words "to the extent of their interest and balance, if any, to J. G.," leaving, however, the original language of the policy legible, and returned the policy thus altered to the person who had requested the alteration, the rights of the parties were not impaired and they could not maintain an action against the company as for a conversion of the policy. This decision shows that the mere stamping of the policy "Paid" in the present case, leaving it in other respects in its original condition,

did not impair the rights of the plaintiff, and that she sustained no damage therefrom.

For these reasons, and there being no theory other than that of conversion upon which the company can be held liable, the judgment against the Mutual Life Insurance Company should be reversed.

The cause of action against the defendant Demond stands upon a different footing. We do not think that under the pleadings a recovery in tort for a conversion can be sustained against him; but they are properly framed to sustain an action for money had and received, and the judgment against him conforms to that theory, being for the precise sum received by him from the company less the premiums paid by him, with interest. He was in possession of the policy under a title which, as we have already shown, was invalid and avoidable at her option. While so in possession, and while the policy was still in force, he surrendered it, and received therefor the sum for which judgment has been rendered against him. Whether or not these acts constituted as to him a conversion of the policy is immaterial; for even if they did she could waive the tort and adopt his acts as having been performed for her benefit. Her right to avoid the assignment could be exercised as well after as before his receipt of the avails of the policy, and the bringing of the action against him was a sufficient election to avoid the assignment and adopt his act in receiving the avails. It is true that he paid for the assignment from Kupfer in August, 1876, the amount which Kupfer had advanced in 1875, and which as is found went to the use of plaintiff's husband, and that the plaintiff slept upon her rights until 1881, when this action was brought, and she elected to repudiate her acts on the faith of which the defendant advanced his money; but the period not being sufficient to bar her claim by the statute of limitations, we see no ground upon which we can deny to her the protection against her own acts which is afforded her by *Eadie vs. Slimmon* and like cases.

The exception taken by the defendant Demond to the exclusion of evidence that in August, 1876, when he paid the premium due July 21, 1876, the secretary of the insurance company informed him that the policy had lapsed, but that if he, Demond, would pay the premiums already due, the company would revive the policy for his benefit alone, was not in our judgment well taken. No new policy was issued to Demond and the existing policy could not be revived and at the same time converted into an

insurance in favor of Demond alone. If it was forfeited and the acceptance of the premium from Demond was a waiver of the forfeiture and revival of the policy, the assured was entitled to the benefit of such waiver and revival; but there was no proof that it had been forfeited at that time, as it does not appear that the thirty days' notice required by Chap. 841 of the laws of 1876 had then been given. If the policy had been forfeited, a waiver of the forfeiture would necessarily inure to the benefit of whoever was entitled to the policy.

Judgment affirmed with costs as to the defendant Demond, and reversed as to the defendant the Mutual Life Insurance Company of New York and new trial granted, with costs to abide the event.

All concur.

SUPREME COURT OF WISCONSIN.

Appeal from Circuit Court, Fond du Lac County.

HILES ET AL.

vs.

HANOVER FIRE INS. CO.*)

The answer denied that the plaintiffs sustained an actual loss exceeding four thousand dollars.

Held, That this was not an admission that the loss amounted to that sum.

It was denied that proofs of loss were made and thereupon copies of the proofs were without objection placed in evidence to show that they were so made.

Held, That proofs so admitted for one specific purpose cannot be claimed as proving also the actual loss and amount thereof on the trial.

Held, That where the loss and its amount is not proven on the trial a non-suit should be ordered.

E. Q. NYE and MORROW & MASTERS, *for Respondents.*

QUARLES & SPENCE, *for Appellant.*

ORTON, J.

This suit was brought by the respondents to recover a certain proportion of the loss by fire of certain property insured by the appellant company, and which same property was insured by certain other companies. There were divers defenses, among which were that the insured had misrepresented the amount of property in the place when it was insured and burned, in procuring the insurance, and in the proofs of loss; and in connection with this defense the defendant, in its answer, made this allegation: "The defend-

* Opinion filed, March 16, 1886.

ant denies that said plaintiffs, by the fire in question, sustained an actual loss exceeding the sum of four thousand dollars." It is now insisted by the learned counsel of the respondents, on the argument, that the verdict directed by the court for the plaintiff, of \$1,718, was warranted by this allegation, which is claimed to be an admission of the loss to the extent of \$4 000. But we cannot find in the record that any such claim was made on the trial, but the case seems to have been treated as if the plaintiffs had to fully prove their case, and the course prescribed in section 2,892, Rev. St., in relation to admissions of the whole or a part of the plaintiffs claim expressly made in the answer, was not taken or sought to be taken. But we do not think the allegation, in connection with other parts of the answer, was an express admission of any part of the plaintiffs claim; but, as claimed by the learned counsel of the appellant, it was simply a denial that a greater loss than \$4,000 was possible, because there never was more than that amount of property in the building." The verdict was not demanded on any such ground, and we do not think it can be sustained by any such construction of the above qualified denial. Besides this, there was a general denial in the answer of everything not specifically admitted. It was denied in the answer that the notice of the loss required to be given was ever given, and that any statement and account thereof was ever given in the time prescribed in the policy. It was therefore incumbent upon the plaintiffs to prove that what are called "proofs of loss" were made and delivered to the company, and in the time required. This, at least, was treated as an issue in the case, and the plaintiffs therefore offered a copy of the proofs of loss in evidence without objection, and followed it with proof that the original had been received by the company in proper time. Thereupon the plaintiffs rested their case, and moved the court to direct the jury to render said verdict, and the defendant made a counter-motion that the court enter a nonsuit in the action. There was no particular grounds stated in the record for either motion. There was no other proof of the loss, or the amount thereof, on the trial. The only legitimate ground for a nonsuit at that stage of the trial would be that there was no evidence to warrant a verdict for the plaintiffs, or insufficient evidence.

The deficiency of the evidence, if any, consisted of the absence of all proof before the jury of the plaintiff's loss, and the amount and particulars thereof. The motion for nonsuit was denied, and

the motion to direct the verdict was allowed, and the jury were ordered to return said verdict, presumably on the ground that the copy of the proofs of loss so introduced in evidence without objection was sufficient proof of the loss and the amount thereof. The contention on the part of the respondents now is that such evidence was sufficient; and on the part of appellant company (1) that the copy of the proofs of loss so introduced was only for the purpose of showing a compliance by the plaintiffs with the terms of the policy in making out and delivering proofs of loss within a certain time after the fire as a condition precedent to a recovery, and for no other purpose, and was therefore not objected to; and (2) that such copy so introduced, or the proofs of loss themselves, being *ex parte*, and the mere statement of the loss and its amount by the plaintiffs themselves, never assented to, but always repudiated and denied by the company, were irrelevant, immaterial, and incompetent as proof on the trial of such loss, or the amount thereof, and that the court should have so ruled on the motion for a nonsuit. It is contended, further, by the learned counsel of the appellant that the motion for a nonsuit necessarily, on that ground, was equivalent to an objection made in time to said copy being received in evidence as proof of the loss in fact on the trial, or for any other purpose than to show the performance of such condition precedent by the plaintiffs.

We will not so hold, as a question of practice, in this case, because we choose to decide the main question involved, viz.: Whether, when certain evidence is offered which is competent, relevant, and material, only to prove a certain specific fact, and incompetent, irrelevant, and immaterial as proof of anything else, and it is not objected to as proof of anything else, such evidence shall thereafter be proof of all facts on the merits of the cause, within the subject-matter, or having reference to the subject-matter, of such evidence. As for instance, as in this case, or when the statute requires that before a party injured by a defective highway can bring his action against the town he shall make out and serve on the supervisors a written statement of the defect of the highway and its location, the manner of his injury thereby, and the particulars thereof, and the damages suffered; and on the trial, in order to show a compliance with this condition precedent, he introduces a copy of such statement without objection, and follows it with proof of its due service on the supervisors, and then rests his case,—shall such copy be accepted as due proof of his injury and damages, and the defect of

the highway, and all other facts stated in it as its subject-matter? The policy of our modern practice is that mistake, inadvertence, surprise, and excusable neglect shall work no substantial injury to a party, and that all technicalities, mean advantages, and tricks of practice shall be discouraged and frowned upon by the courts. I do not believe that there is one lawyer in a thousand, of long experience and large practice, who would even suspect that when such evidence is offered, and he was not captious enough to object to it, or object that it should not be received to prove a fact for which it was irrelevant, immaterial, or incompetent, or that it should only be received for the specific purpose for which it was only competent, that it would be claimed that such evidence was sufficient to prove any other and all other facts relating to it on the merits of the case. That such unexpected and unreasonable advantage should be gained by the other party and lost by the party so failing to object, I am quite sure, would be a surprise to the bar generally, and to most courts. The rule is illogical, unreasonable, and fraught with mischief, and it is to be regretted that it has ever met with judicial sanction.

There may be some warrant and excuse for its application in this case in the circuit court by the case of *Bonner vs. Home Ins. Co.*, 13 Wis., 677, although in that case the copy of the proofs of loss was objected to when offered, and it was held that the objection should have been specific as to any other facts than as proof of the performance of a condition of the policy. But the rule laid down in that case has been substantially overruled by this court in *Mead vs. Hein*, 28 Wis., 533. In that case a deed was offered for a specific purpose, and because not objected to, except by a general objection, it was afterwards claimed that it should be considered in evidence to prove the value of the lots by the consideration named in it,—an entirely different purpose,—and it was held that it was irrelevant and incompetent proof of such fact, and therefore not to be treated as in evidence for such purpose. The question was so decided in that case without reference to *Bonner vs. Home Ins. Co.*, supra, it is true, but afterwards Mr. Justice Lyon appended to the case a note in explanation, but the decision was, nevertheless, allowed to stand as an authoritative one of the question. If the learned counsel of the respondent, or the court, had consulted that case, the rule would probably not have been applied in this case. The true limitation of the rule is suggested in the above-mentioned note, and that is, when any matter of evidence is offered, and no objection, or a mere general objection, is made, it is to be evidence, if received, for

all purposes for which it is relevant and competent, but no further. Suppose, in a notice to quit served by a landlord as condition precedent to commence proceedings for unlawful detainer, there is a statement that the tenant's lease has expired, or that there is so much rent due and unpaid. On the trial the copy of such notice is offered in evidence without objection, and followed by proof of the service of the original, and the plaintiff rests his case, insisting that the notice is proof of the expiration of the lease, and that so much rent is due and unpaid. Those statements of the landlord are not relevant or competent evidence against the tenant, and therefore, for such purpose, should not be received. Such is the true rule.

The proofs of loss are made to apprise the insurance company of the facts, and enable the adjusters of the company to pay without suit, or to examine into the particulars in order to determine whether they will do so. It is, after all, a mere claim asserted by the insured, and no more competent as evidence in court of the facts claimed by him therein to be true than the oral or written claim of any other party before suit. The rule is too preposterous for argument. *Hincken vs. Insurance Co.*, 50 N. Y., 657, is not in point in support of the rule. The objection there was that the proofs of loss were not shown to have been delivered to the company; but the court held the testimony of a witness that he delivered proofs of loss to the company without objection was proof sufficient. The case of *Moore vs. Insurance Co.*, 29 Me., 97, is in point, but rests on no authority and very poor reasons. *Jones vs. Insurance Co.*, 61 N. Y., 79, is not in point, and so as to the case of *Bradford vs. Barclay*, 42 Ala., 375. In *Insurance Co. vs. Zaenger*, 63 Ill., 464, the plaintiff introduced his own proofs of loss without limiting the offer, and they contained an admission in favor of the company that the premises had become vacant three weeks before the loss. The court properly held the plaintiff bound by the admission. These are the cases cited by the learned counsel of the respondent in addition to the case in 13 Wis., which has been overruled,—hardly authority sufficient to sustain such an absurd rule.

On the other hand, in *Insurance Co. vs. Gould*, 80 Ill., 388, it was held that the admission of proofs of loss against a general objection must be limited to the purpose of establishing the fact that such proofs were made and delivered to the company as required by the terms of the policy, and that they were not evidence of the amount of the loss. In *Insurance Co. vs. Rubin*, 79 Ill., 408, it was

held error to allow the proofs of loss to go to the jury as proof of the loss on the trial. *Citizens' Ins. Co. vs. Doll*, 35 Md., 89, is to the same effect. In *Com. Ins. Co. vs. Sennett*, 41 Pa. St., 161, it was correctly held that the introduction of the proofs of loss as a condition precedent was to the court, and not to the jury, and that, therefore, their admission to the jury as evidence of the loss was error, although without objection. In *Newton vs. Life Ins. Co.*, 2 Dill., 154, it was held that the affidavits, as proof of the death of the person whose life was insured, furnished to the company could not be used in evidence of a controverted fact on the trial, although received in evidence after a general objection. In *Newmark vs. Insurance Co.*, 30 Mo., 160, the proofs of loss were offered and received without objection, and the court instructed the jury that they were not evidence of any of the facts stated in them. The supreme court held this instruction proper, saying that "the affidavit required to be appended to every petition might as well be regarded as proof of the truth of its allegations. The contrary decision of *Moore vs. Insurance Co.*, 29 Me., 97, seems to have no support in principle or upon authority." This would seem to be sufficient to set this question at rest.

In the absence of all proof of the loss and its amount, upon the trial, the court should have sustained the motion of the defendant for a nonsuit, and erred also in directing a verdict for the plaintiffs.

The judgment is reversed, and the cause remanded for a new trial.

SUPREME COURT OF WISCONSIN.

Appeal from Circuit Court, Eau Claire County.

JOHANNES

vs.

PHENIX INS. CO. OF BROOKLYN, N. Y.,
IMPLEADED, ETC.*

- A. was insured in the Standard Fire Office of London, and that company, desiring to withdraw from business in the United States, sold and turned over to the Phenix Insurance Company its entire business, and the goodwill of that business in the United States, together with a large amount of bonds and other property; in consideration of which the Phenix Company "reinsured all the risks" of the Standard Company upon property situated in the United States, and agreed that all losses arising under the policies of the Standard Company on such property, after the date of the contract, should be "borne, paid, and satisfied" by said Phenix Company.
- ¶ Held, That A. might maintain an action against the Phenix Company to recover a loss on the property covered by his policy in the Standard Company.

This is an appeal from an order overruling a demurrer to the complaint for insufficiency, as against the appellant. The complaint alleges, in effect, the incorporation of each of the defendants, and their right to do insurance business in Wisconsin; that July 1, 1883, the defendant, the Standard Fire Office of London, Limited, for a premium or consideration then paid, insured the plaintiff's property, described by an insurance policy in writing (No. 134,814) against loss or damage by fire, to the amount of \$1,650, from July 1, 1883, to July 1, 1886. The complaint then contains the following allegations: And the plaintiff further alleges that subsequent to the

* Opinion filed, April 6, 1886.—From *Northwestern Reporter*.

making and issuing of said policy, the defendant, the Phenix Insurance Company of Brooklyn, New York, being desirous of acquiring and purchasing the business and good-will of its co-defendant herein, and the defendant, the Standard Fire Office of London, Limited, aforesaid, being desirous of reinsuring its risks upon property in the United States of America, and having withdrawn from business in the United States, the said defendant-corporation, on or about the second day of January, 1884, made and entered into an agreement in writing, duly executed under seal by each of said defendants, wherein and whereby, for a valuable consideration, the defendant, the Phenix Insurance Company aforesaid, reinsured all the risks of the defendant, the Standard Fire Office of London, Limited, upon property situated in the United States of America, from 12 o'clock noon, in New York, on the first day of January, A. D. 1884; and agreed that all losses arising under the policies of the said defendant the Standard Fire Office, Limited, upon property situated in the United States of America should, after that time, be borne by the said Phenix Insurance Company, and should be paid, satisfied, and discharged by it; and received in part payment therefor an assignment of the \$200,000 in bonds of the United States, which had been deposited by its co-defendant in the State of New York, as required by law, for the benefit and security of the policy-holders of its said co-defendant, the Standard Fire Office of London, Limited, residing in the United States; and thereby reinsured the risk upon the property mentioned in the policy hereinbefore described, and agreed that the loss of this plaintiff arising thereunder should be borne, paid, satisfied, and discharged by said Phenix Insurance Company, which thereupon became owner of the good-will, original documents, and books of its co-defendant herein, relating to the risks aforesaid, and assumed control of the same, and of the business pertaining to said risks, policies, and losses. The complaint further alleges, in effect, that July 4, 1884, and while said policy was still in force, the assured property was destroyed and lost by fire; that there was other insurance on the property in still other companies; that the plaintiff gave notice of loss to the defendants; that within thirty days he rendered a particular account of said loss as he was requested and required to do by them and their authorized agents and adjuster, at considerable trouble and expense to the plaintiff, and was informed by the defendant that no further proofs would be required; that thereupon the appellant denied its liability to pay said loss under said policy, and refused to pay the same, on the

ground that the policy had been reported as written for one year only, instead of three years, and that it did not reinsure said risk; that the defendants had waived further notice or proofs of loss; that sixty days had elapsed before the commencement of this action, and since said notice and proofs of loss and the waiver of further proofs; that the plaintiff had performed all of the conditions of the policy on his part; that the proportionate amount which the defendants were liable to pay to the plaintiff was \$1,402, with interest, for which amount he demands judgment.

GEORGE C. TEALL, *for Respondent.*

L. M. VILAS, *for Appellant.*

CASSIDAY, J.

A policy of fire insurance is a contract of indemnity : Darrell vs. Tibbitts, 5 Q. B. Div., 560. By such contract the insurer agrees to compensate the assured for loss by fire of certain property, for a given time. The existence of such contract gives the insurer an insurable interest in the property insured, co-extensive with its liability : Delaware Ins. Co. vs. Quaker City Ins. Co., 3 Grant Cas., 71 ; New York Bowery Fire Ins. Co. vs. New York Fire Ins. Co., 17 Wend., 359. Here the Standard Fire Office of London insured the plaintiff's property for three years from July 1, 1883. After doing so it became desirous of reinsuring its risks upon property in the United States, and withdrawing from business in the United States. The Phenix Insurance Company of Brooklyn was at the same time desirous of acquiring and purchasing the business and good-will of the Standard Company. Accordingly the two companies made the agreement set forth in the statement of facts, on January 2, 1884. At that time the plaintiff's policy had two years and a half more to run. Of course the Standard Company had an insurable interest in the plaintiff's property commensurate with its liability. The agreement between the two companies, as alleged, was based upon a sufficient consideration. Its validity is not assailed. The contention is that the contract between the two companies is confined strictly to them, and that the plaintiff under his policy issued by the Standard has no privity in the contract made by the Phenix, and can maintain no action thereon against the Phenix. In other words, that it was strictly a contract of reinsurance by the Standard Company, solely for its own benefit, and not for the benefit of any of its then existing policy-holders in the United States.

In support of such contention the learned counsel for the appellant

cites several cases. Some of these cases, and perhaps some others, will now be considered, as the question may be regarded as new. In doing so we shall confine ourselves very much to the wording of each particular contract adjudicated, for the question presented is, after all, one of contract. The construction given to one contract may essentially aid the construction of another; but this is so only where the clauses of the two contracts to be construed are substantially alike. Some of the cases cited were upon contracts of strict reinsurance, as above defined, and clearly sustain the position of counsel, if the contract here is to be so restricted: *Hastie vs. De Peyster*, 3 Caine, 190; *Herckenrath vs. American M. Ins. Co.*, 3 Barb. Ch., 63; *New York Bowery Fire Ins. Co. vs. New York Fire Ins. Co.*, supra; *Hone vs. Mutual Safety Ins. Co.*, 1 Sanf., 137; s. c., 2 N. Y., 235; *Carrington vs. Connecticut F. & M. Ins. Co.*, 1 Bosw., 152; *Blackstone vs. Allemania Fire Ins. Co.*, 56 N. Y., 104; *Strong vs. Phoenix Ins. Co.*, 62 Mo., 289; *Gantt vs. American Cent. Ins. Co.*, 68 Mo., 503; *Delaware Ins. Co. vs. Quaker City Ins. Co.*, supra.

Thus, in *Hone vs. Mutual Safety Ins. Co.*, supra, the defendant, by the policy of reinsurance, "promised and agreed to make good to the American Mutual Insurance Company all such loss or damage," etc. So, in the case cited in Bosworth the agreement was to "reinsure the American Mutual Insurance Company of Amsterdam, upon the following policies issued by them, loss, if any, payable to the assured upon the same terms and conditions, and at the same time, as are contained in the original policies." A description of the several policies is then given. The court, at general term, said: "If the word 'assured,' as used in this contract, means the party re-assured, the present plaintiffs have no interest in the contract, and no right to maintain an action upon it;" * * * but "if the word 'assured' does not mean the party 'reinsured,' and that party only, then it includes and embraces, not only the plaintiffs, but also nineteen other individuals and firms. By the contract of reinsurance the defendants took upon themselves the risks which the corporation reinsured had incurred by insuring twenty separate and distinct policies." The court then determined that the word "assured," as used, meant the company issuing the original policies and obtaining the reinsurance, and not any of such policy-holders. In *Blackstone vs. Insurance Co.*, supra, the agreement was simply to reinsure the company, and the principal contention was whether the insurance was double under the peculiar wording of the policy. The same is

true of *Owens vs. Sturges*, 67 Ill., 366, and *Insurance Co. vs. Insurance Co.*, 38 Ohio St., 11, cited.

But in the case before us the contract between the defendant companies was, as it seems to us, something more than a mere re-insurance. By that contract the Standard Company sold and turned over to the Phenix its entire business, and the good-will of that business, in the United States, together with a large amount of bonds and other property, in consideration of which the Phenix thereby "reinsured all the risks" of the Standard Company "upon property situated in the United States; * * * and agreed that all losses arising under the policies of the said defendant, the Standard Fire Office, Limited, upon property situated in the United States of America, should, after that time (January 1, 1894), be borne by the said Phenix Insurance Company, and should be paid, satisfied, and discharged by it; * * * and agreed that the loss of this plaintiff arising thereunder should be borne, paid, satisfied, and discharged by said Phenix Insurance Company; which thereupon became owner of the good-will, original documents, and books of its co-defendant herein [the Standard Company] relating to the risks aforesaid, and assumed control of the same, and of the business pertaining to said risks, policies, and losses."

Such are the alleged terms of the contract we are required to construe. The losses thus arising under the policies could only "be borne, paid, satisfied, and discharged" by the Phenix in a direct transaction with the policy-holders. Even a payment by it of the loss to the Standard Company would not satisfy or discharge the plaintiff's claim for such loss on his policy. That could only be done on payment to the plaintiff. It seems to us by the terms of the contract, as alleged, the Phenix, in effect, thereby assumed the risk covered by each policy, and agreed to pay any loss arising under each policy. The mere fact that the plaintiff was not named in the contract does not preclude him from maintaining an action upon the contract. Thus a policy "for whom it may concern," assures all persons known to the insurers or not : *The Sidney*, 23 Fed. Rep., 88. So, an agreement "to become insurer to C. for the benefit of himself and others having tobacco in store, and to be stored, in his warehouse, on said stock of tobacco," was held by this court sufficient to sustain an action on the contract against the insurer, and in favor of such "other" persons, though not named : *Strohn vs. Hartford Fire Ins. Co.*, 33 Wis., 648; s. c., 37 Wis., 627. In *Glen vs. Hope Mut. Life Ins. Co.*, 1 Thomp. & C., 463, s. c. affirmed, 56 N. Y., 379, the

defendant had agreed with the Craftmen's Assurance Company to reinsure the latter company on all its risks "for which policies of the said party of the second part [Craftmen's Assurance Company] are outstanding at this date, and hereby agree to assure all such policies, and to pay the holders thereof all such sums as the party of the second part may, by force of such policies, become liable to pay,

* * * the liability for death losses to be limited to such deaths as may occur on and after this date;" and it was held that the defendant was liable on the contract of reinsurance directly to the several holders of policies for the whole amount insured thereby. The same doctrine, upon the same reinsurance contract, was reaffirmed in *Fischer vs. Hope Mut. Life Ins. Co.*, 40 N. Y. Super. Ct., 291; s. c., affirmed, 69 N. Y., 161. It seems to us that the contract of reinsurance in those two cases was substantially like the one at bar. Those actions in favor of such policy-holders, upon such contract of reinsurance, were sustained upon the authority of *Lawrence vs. Fox*, 20 N. Y., 268, and similar cases. That case has been expressly followed by this court: *Gray vs. McDonald*, 19 Wis., 217. The same principle has frequently been reiterated by this court: *Putney vs. Farnham*, 27 Wis., 187; *McDowell vs. Laev*, 35 Wis., 171; *Bassetti vs. Hughes*, 43 Wis., 319; *Kollock vs. Parcher*, 52 Wis., 399; s. c., 9 N. W. Rep., 67; *Hoile vs. Bailey*, 48 Wis., 450-452; s. c., 17 N. W. Rep., 322; *Town of Platteville vs. Hooper*, 63 Wis., 383; s. c., 23 N. W. Rep., 581. The principle thus sanctioned in these cases is to the effect that if, on the receipt of a good and sufficient consideration, A agrees with B to assume and pay a debt of the latter to C, then C may maintain an action directly upon such contract against A, notwithstanding C is not privy to the consideration received by A. We think the case at bar comes within the principle.

The order of the circuit court is affirmed.

SUPREME COURT OF IOWA.

Appeal from Des Moines Circuit Court.

CARPENTER

vs.

CENTENNIAL LIFE ASS'N.* }

The insured was duly notified when the premium on his life insurance became due, but prior to the time of payment had become delirious, and afterwards died leaving it unpaid.

Held, That the sickness was not an act of God which excused payment, and a prompt tender by the widow on learning of the non-payment will not save from forfeiture.

This is an action in chancery on a policy of insurance upon the life of Henry L. Carpenter. Plaintiff is his widow, and prays that defendant may be required to make assessments upon holders of its policies to pay the amount insured upon the life of her deceased husband, as provided for in the policy. The defendant, as a defense to the action, alleges that when the assured died he had made default in the payment of an assessment which, under a condition of the policy, rendered it void. The cause was tried upon an agreed statement of facts, and a decree was entered dismissing plaintiff's petition. She now appeals to this court.

STOW, HAMMOND & DAY, *for Appellant.*

NEWMAN & BLAKE, *for Appellee.*

* Opinion filed, April 6, 1886.

BECK, J.

1. The agreed statement of facts upon which the case was tried is in the following language: "(1) The plaintiff was the wife of Henry L. Carpenter at the date of his death. (2) On the 22d day of May, 1883, the defendant association issued the policy declared upon, insuring the life of Henry L. Carpenter. (3) The insured, in his lifetime, had not been liable to pay any assessments or dues, except the \$5 dues which fell due December 1, 1883. (4) The plaintiff had no knowledge of the conditions of said insurance, or that the dues became delinquent December 1, 1883, until after the burial of the insured, December 9, 1883. (5) In the fall of 1883 the said Henry L. Carpenter was taken sick, and on the 12th day of November, 1883, he went to bed with typhoid fever, and after the 17th or 18th of November, 1883, he had no conscious understanding of anything whatever, because of his delirious condition. (6) The life insured expired on the 8th day of December, 1883. (7) During the last illness of the said insured, his business, mail, and correspondence were kept from him by direction of his physician, but plaintiff at once forwarded the dues after she discovered, on December 9, 1883, that they were delinquent; and the defendant refused to receive the same, claiming that the policy had lapsed for non-payment of said annual dues on or before December 1, 1883. (8) The policy was in custody of the assured continually from its date to the time of his death, and the date when said annual dues are payable is therein fixed and definitely named. (9) The notice sent by the defendant, reminding him that, by the conditions of his policy, his annual dues of five dollars were due and payable December 1, 1883, was duly mailed to the assured on the 15th of November 1883, properly addressed, directed, and forwarded, and reached said assured in due course of mail, about November 17, 1883, but for the reasons heretofore set forth he never saw it or knew of its receipt. (10) Proof of loss was duly made December 22, 1883, and demand that an assessment be made as provided in the policy sued on, and the company declined and refused to make the same for the sole reason that said policy was void and had lapsed by the failure to pay the annual dues of five dollars on or before December 1, 1883. (11) No person other than the plaintiff is interested in the subject-matter of this action."

2 Counsel for plaintiff insists that the obligation of the assured to pay the assessment was a condition subsequent, the non-performance

of which was excused by the unconsciousness and delirium of the assured, which is to be regarded as the act of God. It is urged by counsel that as it became impossible for the assured to pay his insurance by reason of his visitation of God, the policy did not become forfeit.

3. It is a familiar rule that when the performance of a contract becomes impossible by the act of God, the obligor is excused, and his rights under the contract are not forfeited. We presume that the rule contemplates cases of absolute impossibility to perform contracts; as in the case of the destruction of property which the obligor undertook to deliver, as the closing of a river with ice upon which the obligor undertook to sail a vessel to be delivered at a port situated on the river. In such cases the obligors could not have performed the conditions of the contract, nor could they have been performed for the obligors by others. Neither could the obligors, by the exercise of foresight and care, have provided against the effects of the act of God, which destroyed the subject of the contract or the sole means of its performance. But there was no such impossibility of performing the contract in this case. It is true it was impossible for the assured at the time required therein to perform it; but he could have provided for its performance beforehand, and those of his family about him could have performed it for him. The fact that the plaintiff did not know of the existence of the policy before her husband's death does not change the case. Prudence and care on the part of assured would have prompted him to prepare for the payment of the assessment upon the day it became due, and to inform his wife of his contract, and his obligation to perform it at the time therein prescribed. We reach the conclusion that the facts of the case do not constitute grounds for excusing the non-performance of the contract of the assured, and do not present a case of impossibility of performance caused by the act of God. Our conclusions are supported by the following cases: *Klein vs. Insurance Co.*, 104 U. S., 88; *Thompson vs. Insurance Co.*, id. 252; *Wheeler vs. Connecticut Mut. Life Ins. Co.*, 82 N. Y., 543. Other cases tending in the same direction could be cited.

4. Counsel for plaintiff cite many cases wherein it is held that the non-performance of contracts may be excused by the act of God, rendering performance impossible, but these facts distinguish them from the case at bar. They cite other cases, wherein it is held that

performance is excused by reason of the act of the government rendering performance impossible, and probably others which hold that performance will be excused when it becomes unlawful; but it is obvious that these decisions are not applicable to the case before us, and do not serve to elucidate the principles upon which it should be decided.

It is our opinion that the judgment of the circuit court ought to be affirmed.

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF MICHIGAN.

CRAIG, ADM'R,

vs.

CONTINENTAL INS. CO.*)

The act limiting the liability of the owners of vessels applies to a vessel in a wrecked condition, though she be incapable of self-propulsion, or of carrying a cargo.

The "knowledge and privity" of the wrecking master of an insurance company is not the knowledge and privity of the corporation so far as to charge it with responsibility for his negligence beyond the value of the vessel.

On motion for a new trial.

The facts of this case were substantially as follows:—

Plaintiff was the administrator of the estate of John Carbry, deceased, who, at the time of his death, was the engineer of a steam-pump on the *Enterprise*. On November 20, 1883, while upon a voyage from Sarnia to Lake Superior, the *Enterprise* went ashore upon Green Island, in the northern part of Lake Huron. While in that condition she was abandoned to her underwriters, of which defendant was one. These underwriters were represented by Crosby & Dimock, general insurance agents at Buffalo. Upon receiving notice of the loss, Crosby & Dimock sent word to Capt. Rardon, their wrecking master, to organize an expedition and go to her relief. Rardon was what is called a marine inspector of four insurance companies represented by Crosby & Dimock. Among his other duties was that of rescuing wrecked vessels and getting them to a port of safety. He carried a card, upon the back of which were the printed

* Decision rendered, February 8, 1886.—From *Federal Reporter*.

names of four insurance companies known as the "Big Four," one of which was the Continental. The face of this card contained his name and the words "Marine Inspector." Upon receiving these instructions he hired the tug *Ba'ize* and certain steam-pumps, and went to Green Island. Upon arriving there, he found the *Enterprise* had been lying 10 or 12 days upon the beach, got her off without great difficulty, and started to take her to Detroit. John Carbry, the plaintiff's intestate, was the engineer of the steam-pump and in the immediate employ of the owner of the pump. About half way down the lake, and off Pointe Aux Barques, the *Enterprise* suddenly filled, and sank with all on board.

The plaintiff claimed that Rardon was negligent in attempting to cross the lake at this season of the year, without having made a thorough examination of the vessel's condition before setting out. He recovered a verdict for \$8,000, and the defendant moved for a new trial.

F. H. CANFIELD, *for the Motion.*

DON. M. DICKINSON, *for Plaintiff.*

BROWN, J.

The most important question in this case, and one which goes to the entire merits of the plaintiff's claim, arises upon the request of the defendant to charge that the limited liability act is a complete bar to the action. This act, which, so far as it is applicable to this case, is embodied in Rev. St., § 4,283, declares that "the liability of the owner of any vessel, for any * * * act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." It is conceded in this case that the *Enterprise* became the property of the defendant by virtue of the abandonment, and that she became a total loss at the time of the death of Carbry. If the act applies to this case, it follows that the liability of the defendant was extinguished by the sinking of the vessel. There is no doubt that when the loss is total this fact may be pleaded and no proceedings under the statute are necessary: *The Scotland*, 105 U. S. 24.

It was suggested upon the argument that the statute did not apply to a vessel in the condition of the *Enterprise*; but this objection is without force. She was still a vessel, though seriously injured by the stranding, and was in a condition to do damage to other prop-

erty. It certainly cannot be the law that the owner loses the protection of the act the moment his vessel goes ashore, and that he must abandon her then at the peril of waiving this defense.

It is further insisted, however, that the act does not apply, as the negligence was not without the privity or knowledge of the owner. This position assumes that the knowledge and privity of Rardon was that of the insurance company; in other words, that he stood in the position of owner to this vessel. Upon the trial of this case I felt very grave doubt as to the soundness of this proposition, but decided to give plaintiff the benefit of this doubt, that the question might be more carefully considered upon motion for a new trial. None of the reported cases are decisive. Few of them throw any light upon the point. It was held in *Walker vs. Transportation Co.*, 3 Wal., 150, that the owners of the vessel were entitled to the benefit of the act, notwithstanding the negligence of their officers and crew; in other words, that the negligence of the owner must be a personal negligence; but the question who is the person whose negligence shall deprive a corporation owner of the benefit of the act was not considered. This ruling was followed in *The Whistler*, 2 Sawy., 348, and in *Chisholm vs. Northern Transp. Co.*, 61 Barb., 363. Such is also the ruling of the English courts: *Wilson vs. Dickson*, 2 Barn. & Ald. 2-13; *The Warkworth*, 9 Prop. Div., 20. In *Lord vs. Goodall*, 4 Sawy., 292, it was said that when the owner is a corporation, the privity or knowledge of the managing officers of the corporation must be regarded as the privity and knowledge of the corporation itself; citing *Philadelphia, etc., R. Co. vs. Quigley*, 21 How., 202, and *Hill Manuf'g Co. vs. Providence, etc., S. S. Co.*, 113 Mass., 495, wherein it was said, in reference to this act, that "if the owners are a corporation, the president and directors are not merely the agents or servants, but the representatives, of the corporation, and the acts, intentions, and negligence of such officers are those of the corporation itself."

These appear to be the only cases in which the point is alluded to. If the question were whether Rardon was a fellow-servant of Carbry, in such sense as to make the corporation responsible to the plaintiff for his negligence, we should have no hesitation in saying, upon the authority of *Hough vs. Railway Co.*, 100 U. S., 213, and *Chicago, etc., R. Co. vs. Ross*, 112 U. S., 377, s. c. 5 Sup. Ct. Rep., 184, that he was not. But in this class of cases the question is not one of exemption, but of limitation of liability. The act does not contemplate that the owner shall be exempt from liability by reason of the negligence

of his servants, but that his liability shall be limited to his interest in the vessel, unless his personal negligence shall have contributed to the loss. Rardon was not an officer of the corporation. He was not its general agent. He was the marine inspector or wrecking agent of four companies, of which the defendant was one. He was not even employed directly by the corporations, but by Crosby & Dimock, their general agents at Buffalo; and, so far as the record shows, neither the president nor the directors of these corporations had any knowledge of his appointment. His powers were no greater than those of the master of a vessel, whose authority to employ assistance when his ship is stranded is beyond dispute. If the owner had been an individual instead of a corporation, it would have seemed clearer that Rardon did not stand in his place, but the law applicable to the case would be the same. We are entirely clear, in our opinion, that the case is within the act, and that the judgment should be for the defendant.

The verdict will be set aside, and a new trial granted.

COURT OF APPEALS OF NEW YORK.

PHEBE SCHUSTER *ET AL.*, *Respondents*,

vs.

DUTCHESS COUNTY MUTUAL INS. CO., *Appellant*.

The policy was for separate amounts upon the building and upon personal property in separate amounts.

Held, That the contract was severable, and misrepresentations as to the ownership of the building would not vitiate the policy as to the personal property.

MILLER, J.

In the case of *Merrill vs. Agricultural Ins. Co.*, 73 N. Y., 752, this court held that where by a policy upon several separate and distinct clauses or species of property, each of which is separately valued, the sum total of the valuations is insured on payment of a premium in gross, the contract is severable, and a breach of a condition avoiding the policy as to one of the items does not affect it as to the others; at least when there is nothing in the terms, in the nature of the contract, or of the different subjects of the insurance, or in the surrounding circumstances, from which it can be inferred that the insurer would not have been likely to have assumed the risk on one or several of the subjects of the insurance, unless induced by the profit or advantage of having a risk upon all.

In the case cited there was a separate insurance upon the buildings erected on the real estate as well as upon the personal property. By the policy different classes of property were insured for separate and distinct amounts, and under the case cited it must be considered not as a contract entire in itself, but as one which is severable

and in which the separate amounts specified may be distinguished, and a recovery had for one of them without regard to the others.

The same view of the question was taken in an elaborate opinion in the unreported case in this court of *Heacock vs. Saratoga Mutual Fire Ins. Co.* In that case the policy insured the plaintiff on his woolen factory, and on his machinery separately, and it appeared that the plaintiff had no title to the real estate, yet a recovery was had for the value of the machinery separately. The case is strikingly analogous to the one under consideration, and taken in connection with *Merrill vs. Agricultural Ins. Co.*, *supra*, appears to be conclusive upon the question presented. The alleged false representation here consisted in the statement made as to the ownership of the building insured, and while such representation rendered the policy void as to the real estate, and if made with full knowledge of its falsity, might affect the entire policy, the facts connected with it were a proper subject for consideration in reference to the personal property, which was severed from the real estate, in determining whether a fraud was intended; and, in view of the authorities cited, it was a question for the jury to decide whether, under the circumstances, there was an intent to defraud or whether the misrepresentations were made under a misapprehension as to ownership of the property.

The counsel for the appellant insists that the negotiation for this policy was vitiated by the false representation in the application and no contract resulted from it, and we are referred to numerous authorities to sustain the position that a false representation of a material fact is sufficient to avoid a policy of insurance made on the faith of it, whether the false representation be by mistake or design; that such false representation whether known to be untrue or not defeats the policy under the contract of insurance contained in the same and places a misrepresentation upon the same footing as a breach of warranty.

There is no doubt as to the general application of the rule stated, but as we have seen, the authorities cited make a distinction and allow a severance between separate items of insurance on property in the same policy, and in such a case the rule referred to is not applicable.

It is claimed that a distinction exists between the case of *Merrill vs. Agricultural Ins. Co.* and the one considered, but we are unable to perceive any difference between the two cases which prevents the application of the same principle to both of them. In the present

case the insured by their agent misrepresented that they were the owners of the real estate, while in the case cited the insured placed an incumbrance on the property after the policy was issued, but the same principle applies to both cases inasmuch as the amounts insured in the policies were severable. Nor can it, we think, be said that it was unnecessary to consider the question now presented in the case cited, and for that reason it is not in point.

The appellant's counsel also insists that any recovery by the plaintiff is barred by the misrepresentation and false swearing in the proof of loss. This is claimed under the provision in the policy that "any misrepresentation or concealment, or fraud, or false swearing in any statement or affidavit in relation to loss or damage shall forfeit all claim by virtue of this policy, and shall be a full bar to all remedies upon the same."

Upon the trial there was evidence tending to show that the plaintiffs supposed and believed they were the owners of the real estate, and that they made the affidavit accordingly. If this was done honestly and in good faith while laboring under a mistake in law as to their ownership, there is no ground for claiming that the representation was fraudulent and that it should prevent a recovery. This question and all others as to the plaintiff's fraudulent intent were submitted to the consideration of the jury, and as they found for the plaintiffs their verdict must be regarded as final and conclusive. No error was committed by the court in refusing to charge as requested, that if the jury believed from the evidence that Mr. Schuster made and swore to the proof of loss and delivered it to the defendant, intending thereby to obtain from the defendant the amount of insurance upon the house, knowing that the insured was not the owners of it, such false proof of loss precluded a recovery by the plaintiffs.

The court upon the trial charged generally that if there was fraud not limiting it to the personal property, there could be no recovery, thus presenting that question to the consideration of the jury. The request as made asked the court to charge that an untrue statement, not fraudulently made, as to the real estate would defeat a recovery as to the personal. This would have established an erroneous rule for the guidance of the jury, and in refusing the request as made, the court followed the decisions already cited.

The judgment should be affirmed.

All concur, except Rapallo, J., absent.

SUPREME COURT OF PENNSYLVANIA.

Error to the Common Pleas of Cameron County.

RILEY

vs.

COMMONWEALTH MUTUAL FIRE INS. CO.*

A, being a fire insurance agent at Driftwood, in April, 1883, received the application and premium of B for a policy of insurance. A forwarded the application to C, the Philadelphia agent of D (a company), C signed a policy as agent and had his clerk mail it to A for B. It had been the practice of A in business transactions with C on delivering policies, for C to hold the money received until the beginning of the following month, when a statement would be made up and A would send the amount in hand to C; the same custom prevailed between C and D; in accordance with this custom, the money handed by B to A was not at once paid over to C, but was put in the account, being charged to A and credited to C. On May 3, 1883, the property insured was destroyed by fire; on May 5, 1883, A remitted to C his check and notified him of the loss; May 9, 1885, C returned the check to A by mail; A then sent the amount to C in gold, C returned the money by express in a plain envelope, which not being lifted remained in the express office. In an action on the policy D defended, alleging that a condition in the policy, which read as follows: "No insurance, whether original or continued, shall be considered as binding until the actual cash payment of the premium" had not been complied with. *Held*, to be no defense under the circumstances.

NEWTON and GREEN, for Plaintiff in Error.

SEYMOUR D. BALL, for Defendant in Error.

GORDON, J.

When McDonald, at the time of his application for insurance, paid the necessary premium to O'Connor, he (O'Connor) became his agent and deposittee, and at any time before his acceptance of the policy he might have revoked his application, and demanded a re-

* Decision rendered, October 5, 1885.—From *Atlantic Reporter*.

turn of his money; but after such acceptance he could do nothing of the kind. Thenceforth O'Connor was the deposittee of the defendant, and there could be no rescission without its consent, for to all legal intents the contract of insurance was consummated and the premium belonged to the company as fully as though it were in its vaults. This policy, regularly executed and countersigned, was put into O'Connor's hands by Crane, the defendant's general agent, for delivery and receipt of the premium, and for no other purpose, and nothing is more certain than that from and after that delivery, the money in his possession belonged no longer to McDonald, but to the defendant. If then, the company received the premium and McDonald the policy, we cannot understand **why the** plaintiff should not recover. The plea that Crane had no power to deliver the policy until the premium was actually paid into his hands, is so out of all character that we cannot understand how it could have been effectually imposed on the court below. Crane had the power to issue policies and receive the money, and as in this case, he exercised that power in a legitimate manner and in the ordinary course of business, the company was bound by his acts. Had the money been deposited by Crane's direction in a bank, or had he sent his clerk to deliver the policy and receive the premium, we apprehend no one would be found to say that the transaction would not have been binding on both parties. Why, then, might not O'Connor perform the same executive duties for the defendant or its agent? It is not complained that he did not act faithfully; that he did not retain the money for the company, or that he did not transmit it to the agent in the usual course of business. But as Crane did not receive it until after the loss, therefore O'Connor's agency in the matter, which would have been entirely regular had there been no loss, is to be pronounced void, and he is to be regarded as the deposittee and broker of the decedent. On principle, this treatment of the case cannot be allowed. The company ought to know how its agents are doing its business, and it certainly does know that they necessarily must do that business through the ordinary channels of trade. When, therefore, companies of this kind put it in the power of their agents to deliver their policies to innocent parties, who have paid their money in good faith to persons appointed for that purpose by such agents, they are stopped from gainsaying the regularity of the method so adopted for the collection and transmission of their premiums, and all conditions found in such policies to the contrary are to no purpose.

But we have so fully discussed this matter in the recent case of the Universal Fire Insurance Company vs. Block, that we need not dwell longer upon this subject. We have, therefore, but to add, that the attempt to sustain the judgment of the court below by the case of the Pottsville Fire Insurance Company vs. Minnequa Springs Improvement Co., 100 Penn. St., 137, is a failure. The two cases are as wide apart as the poles. In that case the policy passed from the hands of the agent through no less than three brokers before it reached the insured; he did not pay the premium until after he had received the policy, and the money was never paid to the company nor its agent, neither was it any time within the power or control of either. More than this, the company refused the risk, and the agent, in vain, endeavored to recall the policy. It will thus be seen that the two cases are entirely dissimilar, and the one cannot, by any ingenuity, be made to govern the other. The judgment of the court below is now reversed and a new venire ordered.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BRIGGS, TRUSTEE,)

vs. }

EARL.*

Certificates issued by an association formed under the act, chapter 204, Laws of 1877, authorizing the formation of associations for the purpose of rendering assistance to the widows, orphans, or other dependents of deceased members, are not assignable or transferable by the members of such an association to any one not embraced within one of the classes mentioned in the statute. And this is so, although the beneficiary named in the certificate joins in the assignment.

Bill in equity by the trustee of the minor children of Joseph A. Remington and Adelaide V. Remington, deceased, praying that the New England Mutual Aid Society, one of the defendants, may be restrained from paying over to Earl, another defendant, the amount due Earl upon an assignment made to him by Joseph A. Remington and Adelaide V. Remington, and also the delivery to the plaintiff of a certificate in the defendant's society held by Earl. It appears that July 11, 1877, the New England Aid Society, a mutual benefit association, was incorporated for the purpose of rendering assistance to the widows, orphans, or other dependents of deceased members. On April 16, 1883, the society issued to Joseph A. Remington a certificate of membership, which declared that he was a member of class A, in said society, and that it was issued for the benefit of his widow Adelaide V. Remington, unless he should at any time, or from time to time, thereafter in writing assented to by said society, substitute some other beneficiary or beneficiaries; and in that case,

* Decision rendered, June 22, 1885.—From *Eastern Reporter*.

for the benefit only of the beneficiary or beneficiaries last substituted, before the death of Joseph A. Remington, and upon his death or upon the death of the beneficiary last therein substituted, the society agreed to pay to said beneficiary or beneficiaries or their legal representatives a sum not to exceed \$5,000, provided said certificate should be surrendered and proper receipts for said sum tendered to the corporation. On October 3, 1883, Joseph A. Remington, being indebted to the defendant Earl, joined with his wife Adelaide V. Remington, in a form of an assignment of said certificate, which purported to convey to Earl all their interest in said certificate, the assignment having been made as security for the debt due Earl. The certificate of membership was delivered to Earl at the same time. Joseph A. Remington died January 15, 1884. March 4, 1884, Adelaide V. Remington executed and delivered to the defendant Clinton V. S. Remington an order or assignment of \$1,200 on said society. March 6, 1884, Adelaide V. Remington also made an assignment of her interest in any sum due her under said certificate, or which might become due her from said society, to the complainant in trust, for the benefit of herself and her children. The case was heard by a single justice upon agreed facts and was reserved for the consideration of the full court.

E. P. BROWN & T. M. OSBORNE, *for Complainant.*

J. M. MORTON & J. F. JACKSON, *for Defendants.*

C. ALLEN, J.

The statute of 1877 (chap. 204) authorizes the formation of associations for the purpose of rendering assistance to the widows, orphans or other dependents of deceased members by means of the payment by each member of a fixed sum, to be held by such association until the death of a member occurs, and then to be forthwith paid to the person or persons entitled thereto. The fund so held is not to be liable to attachment by trustees or other process; and it is declared that the provisions of the general laws relating to life insurance companies shall not be applicable to such beneficiary corporations. The question now arises whether the contract entered into by such an association or corporation with one of its members for the benefit of beneficiaries within the classes named, is assignable during his life to a person not within either of those classes. We think it is not. If it were held otherwise, these associations would stand on substantially the same footing as life insurance companies. But such was not the intention of the legislature. The purpose for

which they can be formed is strictly limited by statute to rendering assistance to the widows and orphans of deceased members or other persons dependent upon them. It is not contemplated by the statute that the right to the assistance secured by membership shall be assignable to creditors during the member's life. The purpose of the statute would be defeated by allowing an assignment during the member's life to his creditors as collateral security. The assignment to Earl was therefore invalid.

The order of March 4, 1884, to Remington constituted a good assignment in equity to the amount of \$1,200 of the widow's interest, which had then become vested, and, having been made for a good consideration, was not revocable. Moreover, the acts of the treasurer amounted to a ratification of it. He is, therefore, entitled to the amount of his order and the plaintiff to the residue.

Decree accordingly.

COURT OF APPEALS OF NEW YORK.

ATTORNEY-GENERAL
vs.
ATLANTIC MUT. INS. CO.

JERMAIN
vs.
HENDRICKS.*

It was sought to have a judgment paid out of surplus realized by the receiver of an insolvent life company from the sale of mortgaged property on the ground that the judgment was a lien prior to that of the receiver.

Held, That the receiver became vested on his appointment with the title to all real estate, and any title remaining in the company was merely formal and in trust for the receiver, the title of the latter was therefore superior to the judgment lien.

WILLIAM BARNES *for Appellant*.

N. C. MOAK, for the receiver, *Respondent*.

EARL, J.

Edward Newcomb was appointed receiver of the Atlantic Mutual Life Insurance Company on the 6th day of August, 1877, under chapter 902 of the Laws of 1869. At and prior to that date the company owned certain real estate which was subject to a mortgage given by a prior owner thereof. Immediately after his appointment the receiver took possession of the property of the company, including the real estate. On the 25th day of June, 1880, William Barnes, the appellant, recovered a judgment against the company, which was docketed in Albany County. On the 7th day of October, 1881, the receiver, pursuant to an order of the supreme court, sold the real estate to Barclay Jermain, for \$10,400, subject to the prior

* Decision rendered, October 30, 1885.

mortgage. Some question having been made as to the receiver's title, that sale was rescinded, and an agreement made between Jermain and the receiver that upon a foreclosure sale under the mortgage Jermain would bid for the real estate the amount due upon the mortgage, together with the costs of the foreclosure, and that he would pay the receiver the balance up to \$31,010.54, the sum which he had agreed to pay, including the mortgage upon the prior sale. At the foreclosure sale, Jermain, in pursuance of this agreement, bid the amount due upon the mortgage and the costs, and paid over to the receiver, in addition thereto, upwards of \$9,000. Thereafter Barnes, claiming that that sum was a surplus realized upon the foreclosure sale, made this motion to have his judgment paid out of the same on the ground that it was a lien upon the real estate subject to the mortgage, and prior and superior to the title of the receiver.

As appeared by the opinion of the general term, it was there held that the fund which Barnes claimed to have applied on his judgment was not strictly surplus money arising upon the foreclosure sale, and upon that ground the court denied his claim. We might rest our decision here upon the same ground. But there is another ground still more radical and satisfactory. The receiver, upon his appointment, became vested with the title to all the property of the company, including its real estate. Section 7 of the act of 1869 authorized the court to appoint "a receiver of all the assets and credits" of the company, and provided that the receiver, upon filing his bond, shall "take possession of all the assets and credits" of the company. The word "assets," where it is used in the several sections of that act, manifestly means all the property, real and personal, of any company coming under its provisions. No provision is made in the act for any formal conveyance to the receiver, and it cannot be supposed to have been the intention of the legislature to leave the title to its real estate in the insolvent company subject to the risks of judgment, liens, or other complications. The purposes of the act require that such title should at once vest in the receiver, and we think the act should receive such a construction as to effectuate such purpose. It is not a general rule that a receiver can only take title from an insolvent person or corporation by a formal conveyance. The general rule is otherwise, as in the case of receivers appointed in supplementary proceedings, and receivers and assignees appointed in bankrupt proceedings, and in nearly all cases of the appointment of receivers of insolvent corporations. The title of

receivers in such cases to real and personal property, both in this country and in England, is generally statutory, and not under any formal conveyance. But even if we are wrong in this, prior to the recovery of the judgment by Barnes, the receiver had the equitable title and the possession of the real estate. All the title, if any, which remained in the corporation was merely formal, and was held by it in trust for the receiver, which it could be compelled by the court at any time to convey to the receiver. The receiver's title was, therefore, superior to and older than the lien of the judgment.

It is, therefore, clear that the order of the general term is right, and should be affirmed, with costs.

All concur.

SUPREME JUDICIAL COURT OF MAINE.

PACKARD

vs.

DORCHESTER MUT. FIRE INS. CO.*)

Where a person assumes to be the agent of an insurance company and writes an application with his name upon it as agent, and the company receives it, writes a policy upon it with the name of the assumed agent on the back, sends it to him to deliver and collect the premium, the assured (himself believing in the agency) may well consider these facts as a recognition, on the part of the company, of the agency.

The agent of an insurance company may bind the company by waiving written assent to material alterations in the property insured where the assured does not know of any restriction of the agent's authority.

VIRGIN, J.

The policy stipulated that "it shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured or if, without the assent in writing of the company, the situation of circumstances affecting the risks shall, by or with the knowledge, advice, agency or consent of the insured, be so altered as to cause an increase of such risks."

The testimony showed that the application contained a misrepresentation as to the contiguity of other buildings; and that an alteration of the building insured was subsequently made, causing a material increase of the risk.

It was not controverted that the plaintiffs made their application through one Holman, an insurance agent, believing him to be the agent of the company; that he assumed to act as its agent, wrote the application, sent it to the company with his name as its agent

* Decision rendered, March 23, 1886.—From *Eastern Reporter*.]

upon it; that the company received it, acted upon it, issued the policy in pursuance of it, wrote Holman's name upon the back of it, sent it to him for delivery, and received the premium through him. Thereupon the presiding justice ruled that Holman was the agent of the company.

It was admitted that Holman knew of the misdescription in the application written by him, and that the alterations were made with his knowledge and consent. Whereupon the presiding justice ruled that, notwithstanding the misdescriptions, the company was bound; and that Holman's verbal consent to the alterations were obligatory upon the company under the statute.

We perceive no error in these rulings. To be sure the mere fact that Holman signed the application as agent, was not enough to show him to be the company's agent: *Campbell vs. Mon. F. Ins. Co.*, 59 Me., 430. The defendant could not prevent such an act on his part done in its absence. But that fact, carried home to the company's knowledge by sending to it the application with his assumed official signature thereon, combined with its subsequent acts, including the indorsing of his name on the policy, might well be construed by the plaintiffs as an official recognition of his assumed character at common law, but also to bring his authorization within Rev. Stat., chap. 49, § 18: *Dunn vs. G. T. Railway*, 58 Me., 187; s. c., 4 Am. Rep., 267; *Ins. Co. vs. McCain*, 96 U. S., 84.

The company could doubtless waive written assent to the material alterations: *Adams vs. McFarlane*, 65 Me., 152; *Wood vs. Poughkeepsie Ins. Co.*, 32 N. Y., 619. In the absence of any known restrictions of authority the agent could do the same. It is common knowledge that the authority of an agent comprises not what is expressly conferred, but also, as to third persons, what he is held out as possessing. Hence the principal is frequently bound by the acts of his agent performed in excess or even in abuse of his actual authority; but this is only true as between the principal and third persons, who, believing, and having a right to believe, that the agent was acting within the scope of his authority, would be prejudiced if the act was not considered that of the principal: *Barnard vs. Wheeler*, 24 Me., 412, 418; *Clark vs. Metropolitan Bank*, 3 Duer, 248. This doctrine is established to prevent fraud, and proceeds upon the ground that when one of two innocent persons must suffer from the act of a third, he shall sustain the loss who has enabled the third person to do the injury: *Story on Ag.*, §127.

Of course, when restriction of authority is brought home to the

knowledge of those with whom the agent deals, his acts in excess of such restricted authority will not bind the principal: *Ins. Co. vs. Wilkinson*, 13 Wall., 222. Thus, where one of the express conditions of a policy was that "no officer, agent, or representative of the company shall be held to have waived any of the terms and conditions of the policy, unless such waiver shall be indorsed hereon in writing," it was held that this limitation of power of the agent to waive the conditions was brought to the knowledge of the insured by the policy itself, and any attempted waiver otherwise than therein stipulated was not binding upon the company: *Walsh vs. Hartford F. Ins. Co.*, 73 N. Y., 5, 9. There is no such clause in the policy now before us.

According to the stipulation in the bill of exceptions, the entry must be, defendant defaulted. Interest to be added from January 22, 1883.

Peters, C. J., Walton, Libbey, Emery, and Haskell, JJ., concurred.

LOWER COURT DECISION.

INSURANCE.—LIGHTNING.—WIND.—VERDICT.

Marion County (Indiana) Superior Court, December 23, 1885.

BARBARA KARIBO.

vs.

INSURANCE COMPANY OF NORTH AMERICA.

A denial of liability and refusal of payment is a waiver of proofs of loss.

If a house be struck by lightning and subsequently destroyed by wind, an insurer against lightning would be liable only for the amount of damage done by the former.

Statement.

Action on policy insuring against fire and lightning.

The complaint alleges that in March, 1884, plaintiff was the owner of a certain real property in the town of Brightwood, and held a policy of insurance thereon in the defendant company. That said policy provided against loss by fire and lightning to the amount named in the policy. That in March, 1884, the plaintiff's property (dwelling-house) so insured was destroyed by lightning, and she now seeks to recover the amount due on the policy commensurate with her loss. The defendant company denies the allegations set up by plaintiff, and alleges that said loss, if any, was occasioned by a wind-storm alone, and was not destroyed by either fire or lightning.

It was in evidence that at the destruction of the insured building, a bolt of lightning struck and entered the house, smashing a sewing-machine into pieces, prostrated and rendered unconscious five mem-

bers of the family therein; flashed through the wardrobe, charring and scorching the clothing, and so shattered and weakened the structure as to cause it to fall down upon the unconscious occupants, seriously injuring plaintiff and thoroughly wrecking the building. There was corroborative evidence tending to show that the house was struck by lightning.

In rebuttal it was proven that the building was situate in the wake of a severe storm; that many other houses and barns lying in the same path were also blown down; that the circular motion of the wind or whirlwind caused the building to fall toward the west while the storm tended toward the east, and denied that any proofs of loss had been made, and alleged that the wind and not electricity was the cause of the alleged destruction.

Expert testimony was introduced pro and con, after which the jury was instructed as follows:—

WALKER, J.

“Before you can find for the plaintiff, you must find that the building was destroyed by lightning. The defendant denies the allegations of the plaintiff, which casts upon the plaintiff the burden of proving the material averments of her complaint before a recovery can be had. The defendant also alleges that said loss was by a wind-storm alone, and was not destroyed by either fire or lightning. Therefore, before there can be a recovery, it must appear from the preponderance of the evidence that the property of the plaintiff was insured as alleged; that loss has been sustained by damages to said property from lightning. That due proofs of loss were made to said company, of said loss unless you should find that before suit the defendant refused to pay, denying its liability. No proof of loss was made. The plaintiff claims that defendant denied its liability, and claims to be excused from making such proof of loss as would oftentimes be required.

If the plaintiff has shown by a fair preponderance of the evidence that before the bringing of this suit a proper agent of the defendant denied to the plaintiff or her agent the company's liability and refused payment, then plaintiff would not be required to make any proof of loss, provided she has sustained the other material allegations of her complaint. If such denial of liability on the part of the company was not proven, as I have said it should be, the plaintiff cannot recover, even though she has sustained the loss as she therein claims. If you find that the house was blown down by the wind or

whirlwind, and was not knocked down by lightning, your verdict should be for defendant. Your verdict must rest upon the evidence introduced in the trial of the case, and if you find for the plaintiff you must be satisfied that a preponderance of the evidence shows that the loss came from lightning. You must not rest your verdict on conjecture or speculation, and must be without the regard of any one or hardship that may come from a decision one way or the other. * * The defendant would be liable under the terms of the policy sued on whether there was any fire or not, if damage came by lightning striking the building. If you find from the evidence that lightning entered the building and through the floor, causing damages, but did not cause the building to fall, but such fall was occasioned entirely by the wind, then the company would not be liable for any damages that came to the plaintiff by reason of such fall of the building, but would only be liable for such part of the injury as was done by the lightning. You are the judges of the credibility of the testimony. In case you find for the plaintiff the measure of her recovery will be the extent of her damages occasioned by the lightning, not exceeding the amount named in the policy, with interest."

The jury found that proof of loss was waived by the company; that house was destroyed by the wind and not by lightning, and returned a verdict for defendant.

THE INSURANCE LAW JOURNAL.

VOL. XV.

JULY, 1886.

No. 7

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF IOWA.

Appeal from Appanoose Circuit Court.

ELLIS

vs.

STATE INS. CO.*)

Evidence admitted on former hearing will not be excluded on rehearing in the absence of new facts on account of a better legal argument.

A condition that the policy should be void in case of incumbrance is imported into the new contract with an assignee when the policy is assigned with the consent of the company, and though the assignee might not be affected by a previous incumbrance that had ceased, he would be affected if at the time of assignment or thereafter it was incumbered.

The consent to assignment and receipt of premium are not a waiver of the forfeiture unless the company had knowledge of the incumbrance.

* Decision filed, April 21, 1886.

GEORGE G. WRIGHT and J. B. JOHNSON, *for Appellant.*
TANNEHILL & FEE, *for Appellee.*

ADAMS, C. J.

1. This case is before us upon a second appeal. The first opinion is reported in 61 Iowa, 577. The question raised in that case was as to whether the court erred in excluding evidence offered by the defendant of a mortgage upon the property, placed upon it by the plaintiff's assignors, and remaining until after the loss. This court held that the evidence should have been admitted. The ruling was based upon the fact that the policy provided that "if the title of the property is * * * incumbered, * * * this policy shall be void;" and it was held that a mortgage would be an incumbrance of the title, and would, according to the terms of the policy, render it void. Upon the second trial the evidence was admitted, and showed conclusively that there was a mortgage upon the property, placed upon it by the plaintiff's assignors, and remaining until after the loss. The plaintiff contends, however, that the policy is not void. He calls our attention to the fact that the plaintiff holds the policy by assignment with the assent of the company, and that the mortgage was not executed by himself, but his assignors. His position is that he should not be affected by their act, because when the policy was assigned a new contract arose, and nothing has since occurred to avoid the policy.

The fact of the assignment with the assent of the company appeared upon the former trial. If it should have the effect which the plaintiff contends it should have, then the court, upon the former trial, was correct in excluding the evidence of the mortgage, because it was immaterial whether the plaintiff's assignors had executed a mortgage or not. Evidence which we held was wrongly excluded we are now asked to virtually hold was rightly excluded, and we are asked to hold this, not by reason of any new fact which is put into the case, but by reason of a new legal position taken by the plaintiff's counsel. We are asked now to virtually hold that the evidence was rightly excluded, in contravention of our former ruling, because the plaintiff's counsel have devised a better argument for excluding it.

It is true, upon the last trial the evidence was admitted, but the court, in rendering judgment for the plaintiff, refused to give effect to it, and might as well have excluded it. It is well settled that the rulings of a court of final appellate jurisdiction in a given case becomes the law of the case in all future trials. The defendant con-

tends that that rule should be applied here, though the precise reason now urged for excluding the evidence, or what is the same thing, for refusing to give effect to it, was not urged before.

The question presented is not entirely free from difficulty. Possibly, if it were necessary to rule upon it, we might feel constrained to sustain the defendant; but we have to say that it appears to us that the additional reason now urged by the plaintiff for regarding the evidence of the mortgage as immaterial is as unsound as the one before urged. The plaintiff's position is that notwithstanding the provision of the policy that it shall be void if there is an incumbrance upon the property, it shall not be void in the hands of an assignee if the company assents to the assignment. This position is based upon the idea that at the time of the assignment a new contract arose. It may be conceded that, in a certain sense, a new contract arose. It could not be otherwise where a new party is introduced. But that is not a material consideration. What we have to determine is, what was the new contract? and whether, under such contract, the plaintiff is entitled to recover.

When the plaintiff took an assignment of the policy, all its terms and conditions were imported into the new contract, and it became one of the conditions of the new contract that "if the title of the property is * * * incumbered * * * this policy shall be void." The plaintiff, as assignee of the policy, became a party to such condition just as essentially as his assignors did when the policy was first issued. The condition pertained to the character of the risk as it then was or should be thereafter. The parties originally insured virtually agreed that if there was, at the time the policy was issued, or should be thereafter, an incumbrance upon the property, they should not, in case of loss, be entitled to recover. This was the construction placed upon the condition at the former hearing, and it is undoubtedly correct. When the plaintiff, as assignee of the policy, became a party to the condition, he virtually agreed that if there was then, or should thereafter be, an incumbrance upon the property, he should not, in case of loss, be entitled to recover. We do not say that the mere act of the parties originally insured in casting an incumbrance upon the property vitiated it in the hands of the assignee. He did not agree that his assignors had not incumbered the property. His agreement was that it was not then incumbered, and should not be during the remaining life of the policy. If the policy had not been assigned, and the action had been brought by the parties originally insured, their mere act in casting an incum-

brance upon the property would undoubtedly have constituted a good defense. But as against the assignee the defense is not based solely upon that. The gist of the defense is that the incumbrance was allowed to remain, and affect the risk, under the new contract. If it had been removed before or at the time of the commencement of the new contract, the case would undoubtedly have been different. The assignee could not be regarded as agreeing as to what the risk had been theretofore, but as to what it was then, and should be from that time forward. The company had been paid for carrying a risk upon unincumbered property. The premium, we may presume, had been graduated accordingly. The same rate continued. From the commencement of the new contract the company was bound to carry that risk, and only that.

The plaintiff relies upon *Ellis vs. Council Bluffs Ins. Co.*, 64 Iowa, 510. It was held in that case that where a new contract arises by reason of the assignment of a policy of insurance, the assignee is not affected by the acts of the assignor. While we see no reason to change our view as expressed in that case, the doctrine should not be understood as having the scope for which the plaintiff contends. In that case the defendant set up a fraudulent statement as made by the insured at the time he made his application for the insurance. Now, as a new contract arose, which new contract was not obtained by fraud, it was thought that it should not be held to be void. The assignee was not only not guilty of any fraud, but could not be presumed to have knowledge of the assignor's fraud, nor to be in fault for want of knowledge of it. Besides, in that case, there was nothing tending to show that the risk at the time of the assignment was greater than the company undertook to carry. The fraud set up was that there was a false statement in respect to the property being free from incumbrance. But there was nothing tending to show that at the time of the assignment, at which time the new contract arose, the property was not free from incumbrance. The case is not different in principle from one where there is a promissory warranty against a specified use. A breach of the warranty arising from a prohibited use which had been discontinued before assignment, and not longer affecting the risk, should not be held to vitiate the policy in the hands of the assignee, under the new contract. It is true, the terms of the policy, including the promissory warranty against the specified use, should be regarded as forming a part of the new contract; but, then, the promissory warranty, after the new contract arises, is merely that of the assignee, and if he is not guilty of a

breach of it, the new contract is not forfeited. So, too, there is another class of cases where the act complained of is the act of the assignor, done after the assignment. Of this class is *Foster vs. Equitable Mut. Fire Ins. Co.*, 2 Gray, 216. The assignor's act, done after the new contract arose, could not be deemed a breach of the new contract, for reasons too obvious to require any discussion.

In the case at bar what is complained of is a subsisting incumbrance, and that was provided against as much by the new contract as by the old. The assignee became a party to the stipulation or condition that there should be no incumbrance upon the property. The breach, then, which forfeits the contract is his breach. If the incumbrance had been removed before assignment, so that there was nothing to complain of except the act of the assignor, which had spent its force and had become inoperative as affecting the risk under the new contract, the case would have fallen under the rule as recognized in *Ellis vs. Council Bluffs Ins. Co.*, above cited.

The plaintiff has much to say about a waiver. He contends that the company, by consenting to the assignment, should be held to have waived, not only the forfeiture caused by the act of the assignor in placing the incumbrance upon the property, but should be held to have waived the incumbrance itself as a subsisting incumbrance, which, more properly stated, would be a waiver of one of the provisions of the new contract. It is not necessary to set out all the objections which might be urged to this position. If the provision against a subsisting incumbrance was waived, then all similar provisions were waived. It may be conceded that if the company received any new consideration with knowledge of a forfeiture, that would be a waiver of the forfeiture. No insurance company should take the money of the insured if at the same time it intends to repudiate the policy. It is a familiar doctrine that the receipt of a premium after knowledge of forfeiture is a waiver of the forfeiture. But there is no pretense that the company had knowledge of the incumbrance. The most that is claimed is that when the company was applied to for its consent to the assignment the company should have ascertained whether there was an incumbrance or not before consenting to the assignment. But, in our opinion, there is no warrant for holding such rule, and it would unquestionably work great mischief if we should hold it. The defendant probably does business in every county in Iowa. It is not practicable for it to ascertain what incumbrances exist upon all insured property, recorded and unrecorded.

The plaintiff endeavors to base an argument upon the alleged fact that the company received a consideration for its consent; but the fact is otherwise. It is said that by reason of the consent the company was allowed to retain the unearned premium; but the unearned premium had already been forfeited.

The plaintiff has something to say about the fraud of the defendant in making this defense, but he knows very well that he is seeking to impose upon the defendant a liability for a risk greater than it ever consciously assumed, and greater than it was ever paid for.

We think that the judgment must be reversed.

BECK, J. (dissenting). In my opinion, the defendant in this case cannot set up as a defense to the action brought by the assignee of the policy the fact that the property insured was incumbered by mortgage executed by the assignor of the policy,—the party originally insured. I base my conclusion upon these grounds:—

1. It is a rule, supported by authority, that the assignment of a policy creates between the underwriter and assignee a new contract, which is not affected prejudicially by acts of the party to whom the policy was issued. Under this rule, acts of such party do not forfeit the conditions of the policy in the hands of an assignee when such acts would have that effect had the policy not been assigned. *Ellis vs. Council Bluffs Ins. Co.*, 64 Iowa, 507; *Foster vs. Insurance Co.*, 2 Gray, 216; *City Fire Insurance Co. vs. Mark*, 45 Ill., 482. Counsel for defendant cite, in opposition to the rule, *Ellis vs. State Ins. Co.*, 61 Iowa, 577. They insist that because the opinion in that case shows that the policy was assigned, and yet holds that evidence of an incumbrance put upon the property by the assignor, the original assured, was erroneously excluded, the decision is in conflict with the rule. But this point was not in the case, and the rule was not brought in question or referred to in the opinion. It seems the evidence was objected to only upon the ground that the conditions of the policy provided against the transfer or change of the title of the property, and that the mortgage sought to be introduced in evidence did not incumber the title, but was nothing more than a lien upon the property. The rule under consideration is not questioned or referred to in the opinion. The decision cannot be cited as in conflict with it.

The rule is supported by the following cogent reasons: The assignee being ignorant of the existence of the ground for forfeit-

ure, perpetrated no fraud upon the underwriter, and practiced no deceit or concealment. He sought indemnity against loss by fire, which it is the business of the insurance company to give. He could have caused the policy to be canceled, and a new one to be issued, the return premium being paid by the company. In order to avoid labor and inconvenience to the company, this course was not pursued, but the policy was assigned, from which the assignee expected to obtain the indemnity sought. He was ignorant of any ground upon which the policy could be invalidated. It may be that the underwriter was also ignorant; but he had it in his power to discover the existence of anything which would defeat the policy. Without pursuing a course of inquiry which would have resulted in disclosing the ground of invalidity of the policy, he treated it as valid, and by his action induced the assignee to rely upon it as indemnity. But it may be said that the assignee, as well as the underwriter, could have made the inquiry as to the validity of the policy. That is true, but there is no reason why he should have pursued such inquiries after finding that the underwriter treated the policy as valid.

It must be remembered that an assignment is not valid except the assent thereto of the company issuing the policy is given through its agent or otherwise. When such assent is given, the policy becomes a contract with the assignee. He is authorized to believe that the insurance company in thus entering into a contract with him by virtue of the assignment binds itself to afford the indemnity he seeks. It cannot, therefore, set up as a defense to the policy any cause of invalidity existing before the assignment, in the absence of fraud, deceit, or concealment on the part of the assignee.

2. It becomes necessary to inquire whether the fact that neither the defendant nor its agent had knowledge of the incumbrance existing at the time of the assignment of the policy takes the case from the operation of this rule. It may be remarked, preliminary to the consideration of this question, that as the plaintiff, the assignee of the policy, had no knowledge of the incumbrance, the case would not be withdrawn from the rule on the ground of fraud on the part of plaintiff, if it otherwise is applicable to the case. The rule recognizes the assignment of a policy as creating a new contract. By this is meant that a new contract of insurance arises upon the execution of the assignment. The company contracts with a new party. The underwriter is the same in the new and in the old con-

tract, but the insured in the two contracts is not the same. The subject of the insurance—the property covered by the policy—is the same in both contracts; and it is very plain that the terms of the two contracts are the same, being expressed in each case by the policy. We think upon these points there can be no doubt.

It cannot be doubted that a violation of the conditions of the policy which would render it void in the hands of the party originally insured would not defeat the new contract—the new policy, for it may be so called—which arises upon the assignment of the instrument. The assignment creates a new contract. It would be absurd to say that such new contract is rendered void by an act done before it was made. If that were so, it would never exist as a contract; the instant the assignment would be made the new contract would be destroyed. It would be still-born; indeed, it would never have an embryo existence. But the law contemplates that the company, by assenting to the assignment, revives the policy which has been avoided by prior acts; or, more properly, it enters into a new contract, which is expressed by the language of the old and void policy. The old contract being void, passed away; the new one is called into existence, and clothed with the drapery of words formed for the old one. In plainer language, the parties, in entering into the new contract, adopted the language of the old. Strictly, there was no waiver of forfeiture of the policy by the assignment. It may be regarded as void, as between the original parties. As between the company and assignee, it was used to express the new contract.

I will now proceed to apply these doctrines to the facts of the case before me. The incumbrance fell upon the property after the policy was originally executed. Under the condition of the instrument it became void. That condition is in this language: "If the title of the property is transferred, incumbered, or changed," the policy shall be void. Under this condition, the policy, when the incumbrance was put upon the property, became void. It will be observed that this condition is not against prior or existing incumbrances. It is against future incumbrances. The new contract of insurance between the company and the assignee would not be avoided by an existing incumbrance. Only an incumbrance that should fall on the property after the assignment creating the new contract would have such effect. It therefore clearly appears that the contract of insurance existing between defendant and the plaintiff is not affected by the incumbrance.

3. It does not appear from the record that the application for insurance by the assignor of the policy contained any representation as to non-existence of incumbrances. We need not, therefore, inquire what effect such representations would have upon the contract with the assignee. It would seem, however, that if there were such representations by the assignor, they could not affect the new contract of insurance with the assignee for at least two reasons: (1) The representations, if made, were true, for the incumbrance fell on the property after the policy was originally executed; (2) the assignee, in entering into the new contract, made no representations of the non-existence of incumbrances. The covenant against existing incumbrances was not violated by the assignor, and was not entered into by the assignee. If there was, in fact, such a covenant in the application, it does not affect the policy in the hands of the assignee.

The foregoing considerations leads me to the conclusion that the judgment of the circuit court ought to be affirmed.

REED, J., concurs in this dissent.

SUPREME COURT OF IOWA.

Appeal from Van Buren District Court.

CRAWFORD STONE)

vs.)

HAWKEYE INS. CO.*)

Where false statements regarding the value and exposures of the risk were written in the application by the agent without the knowledge of the insured, the latter will not be held responsible.

An overestimate of the loss, unless proved to be fraudulent, is not a violation of a policy provision against a fraudulent claim for more than is due.

The receipt of the premium and issue of policy after knowledge by the company of breach of warranty is a waiver of such breach.

Where the company defends on the ground of arson, evidence of previous bad character of the claimant as to honesty is inadmissible.

PHILLIPS & DAY, for the Hawkeye Ins. Co.

SLOAN, WORK & BROWN, for Stone.

REED, J.

The property covered by the insurance was a stock of general merchandise contained in a frame building situated in Mount Sterling, Van Buren County. During the life of the policy the building, and the greater portion of the goods contained in it, were destroyed by fire. The policy was issued on an application taken by a soliciting agent of defendant, a copy of which was indorsed on the policy. One of the provisions of the application is as follows: "The applicant agrees that each of the foregoing answers, statements, and valuations are true, and a warranty on his part; and that the accepting

* Decision rendered, April 23, 1886.

of this risk, and the issuing of a policy of insurance thereon, by the company, is to be based solely upon this application." It was stated in the application that the building in which the goods were situated was insured for \$800; also that the average value of the stock carried by plaintiff was \$4,500, and that the last account of stock was taken in July, 1882 (some eighteen months before the application was made), and that the stock invoiced at that time at \$4,500. Defendant alleges that each of these statements was false, and was willfully and fraudulently made, and by reason thereof the policy never went into force and effect. It was also stated in the application that all of the exposures within one hundred feet of the building containing the goods were correctly shown on a plat which accompanied the application; and it is alleged by defendant that this representation was false, and that there was a number of exposures within one hundred feet of said building, which were not shown upon the plat.

The policy contains the following provision: "And if there appears any fraud, or attempt to defraud, or false oath or declaration, or claim for an amount more than is actually due or legally entitled to, or that the fire shall have happened by the procurement, willful act, means, or connivance of the insured or claimants, he, she, or they shall be excluded from all benefit under this policy, and the company released absolutely from all liability thereunder." In his proofs of loss plaintiff represents that the goods in the building at the time of the loss were, according to his belief, of the value of \$4,000, and that all except \$227.94 worth was destroyed. Defendant alleges that this representation was false, and was made with a fraudulent intent, and that the goods destroyed were of much less value than represented in said proofs, and that plaintiff made claim for an amount largely in excess of the amount actually due under the policy. It is also charged that the fire which destroyed the insured property occurred by the willful act, procurement, or connivance of plaintiff.

It is alleged in the petition that the survey and measurements set out in the plat which accompanied the application were made by the agent, also that he made said plat, and had full knowledge, from a personal examination of the premises at the time he took the application, of the condition of the property; also that he received the premium with this knowledge, and transmitted it to the company, and that it received and retained the same, and accepted the application, and issued the policy thereon; and plaintiff claims that

defendant is estopped by these facts from now asserting that the exposures within one hundred feet of said building were different from what is shown by said plat. He also alleges that the agent filled out the application, and that, when plaintiff was asked by him whether the building was insured, he answered that he did not have positive information on the subject, but stated that he thought it was insured for \$800, and that he had no knowledge, when he signed the application, or when he received the policy, that the agent had not written his answer to said question as he gave it.

In addition to their general verdict, the jury found specially that the building was not insured when the application was signed; also that plaintiff was not prevented by any fraud or deceit from ascertaining the contents of the application when he signed it. They also found that the value of the goods destroyed was but \$2,091.99, and that plaintiff represented in his proofs of loss that the value of the goods destroyed by the fire was \$1,680.07 greater than their value actually was. On these special findings defendant moved for judgment in its favor notwithstanding the general verdict, and the overruling of this motion is assigned as error.

1. The district court instructed the jury, in effect, that plaintiff's right of recovery on the policy would not be defeated by the false statement in the application as to the insurance on the building, if that statement was written in the application by defendant's soliciting agent without plaintiff's knowledge, and plaintiff had made truthful answers to such questions as were asked him by the agent concerning the insurance on said building; and it is conceded that the evidence justified the jury in finding that the statement was written in the application by the agent without plaintiff's knowledge, and that the latter answered truthfully that he thought the building was insured for \$800, but that he had no positive information on the subject. We are of the opinion that the instruction is correct, and that the plaintiff's right to recover on the policy is not defeated by the special finding that the building was not insured. The agent, in whatever he did about the preparation of the application, acted for his principal, the insurance company. He was empowered by it to prepare such applications for persons desiring insurance, and to forward the same to it. He wrote the application in question in the performance of the duties of his agency; and if the company was deceived or misled by the statement in the application that the building was insured, this was in consequence of the negligent or

wrongful manner in which he performed the duties of his employment, and it is consistent with justice, as well as the settled principles of the law, that the consequence of his wrong should be visited upon his principal rather than upon plaintiff, who was guilty of no bad faith in the transaction: *Wood, Ins.*, § 384; *Malleable Iron Works vs. Insurance Co.*, 25 Conn., 465. It makes no difference, we think, that plaintiff agreed that the representations in the application should be regarded as warranties by him. He consented to that agreement in the belief that the agent had written down in the application the very statement he had made. As the agent was empowered by the company to take the statement, and acted under that authority when he wrote it, plaintiff was not charged with the duty of seeing to it that it was correctly taken. He had the right to assume that this was done. It would be manifestly unjust to hold that he was bound absolutely by a statement which was wrongfully interpolated into the application by defendant, and which he did not know was there when he consented to the agreement.

2. We are also of the opinion that plaintiff's right of recovery is not necessarily defeated by the special finding that in making his proofs of loss he overestimated the value of the goods destroyed. The provision of the policy is that "if there appears any fraud, or attempt to defraud, or false oath or declaration or claim for an amount more than is legally due, * * * the claimants shall be excluded from all benefit under this policy, and the company released absolutely from all liability thereunder." Under this provision the company would be released from liability by any overestimate of the loss made by the insured, with intent to defraud. But an overestimate which was made honestly and in good faith, clearly would not have the effect to exclude the claimant from all benefits under the policy. The special findings established that plaintiff made an overestimate of his loss, but it was not found specially by the jury that this was done with fraudulent intent. Whether it was done with such intent was a question of fact which was properly submitted to the jury, and by their general verdict it was determined adversely to defendant. The overestimate, it is true, appears to have been quite large, but it may have been honestly made, and, if so, it will not defeat plaintiff's right to recover for the loss actually sustained. The court cannot say, as matter of law, that it was not so made: *Wood, Ins.*, § 429. As the facts spe-

cially found by the jury do not, either alone or when taken in connection with those admitted in the pleadings, defeat plaintiff's right to recover, the motion for judgment notwithstanding the general verdict was rightly overruled.

3. The district court instructed the jury that if the defendant had knowledge, when it received the premium and issued the policy, of the facts constituting the breaches of the warranties by plaintiff, it would be regarded as having waived said warranties, and that if the agent who took plaintiff's application for the insurance was authorized to receive and forward applications, and to deliver policies, and collect and transmit premiums, the company was bound by whatever knowledge he possessed when the application was taken; and if he made a survey of the premises when he took the application, and measured the distance between the building and the adjacent exposures, and had full knowledge of the situation of the property and the surroundings, defendant was bound by this knowledge, and would be held to have waived any mistakes or inaccuracies in the measurements or in the recitals of the plat which accompanied the application. The giving of these instructions is assigned as error. The instructions, however, are in accord with the holding of this court in *Jordan vs. State Ins. Co.*, 64 Iowa, 216; s. c., 19 N. W. Rep., 917; *Boetcher vs. Hawkeye Ins. Co.*, 47 Iowa, 253; *Miller vs. Mutual Ben. Ins. Co.*, 31 Iowa, 216; *Williams vs. Niagara Ins. Co.*, 50 Iowa, 568; *Eggteston vs. Council Bluffs Ins. Co.*, 27 N. W. Rep., 652.

4. The court gave the following instruction: "Evidence of the good character of the plaintiff for honesty has been introduced to you. You should consider all of the evidence on this question, and then say what the truth is. If you find the plaintiff had before the fire a good character for honesty, then you should consider said fact in connection with the other testimony bearing upon the question as to whether the plaintiff set fire to said building. So, if you find that his character for honesty was not good at said time, then you should consider such fact in connection with the other testimony upon that point." The evidence is not set out in the abstract; but it is conceded that the recital in the instruction, that evidence of plaintiff's former good character for honesty was admitted on the trial, is correct. If, under the pleadings, any possible state of evidence could arise under which plaintiff would be entitled to have

his former good character considered by the jury in determining the question whether he set the fire to said building, on the state of the record before us, we would presume, in favor of the correctness of the ruling below, that such state of evidence did arise upon the trial. The general rule in civil actions unquestionably is that the general character of the parties is not involved in the issue, and evidence concerning it is not admissible. There are, however, exceptions to the general rule. It sometimes happens that the character of a party is the very matter in issue, and in such cases evidence with reference to it is of course admissible. Illustrations of the exception are found in actions for damages for criminal conversation and seduction. It is held in that class of actions that the general character for chastity of the wife or daughter is involved in the issue as affecting the damages, and evidence of bad general character in that respect is admitted. The present case, however, does not fall within the principle of this exception. The allegation in the answer is that the fire which destroyed the insured property was occasioned by the willful act, procurement, or connivance of plaintiff. Conceding that by this it was meant to charge him with having burned the property, with intent to injure the insurer, which, under our statute (Code, § 3,888) is a felony, it still cannot be said that his character for honesty was involved in the issue. His right of recovery did not depend on the question whether his character was good or bad. If the allegation should be proven, his reputation for honesty doubtless would be injuriously affected. But so would that of any other party against whom a charge of gross fraud or forgery should be established in the course of a civil litigation. Charges of this character are often investigated in the civil courts, but it has not generally been supposed that the general character of the parties was involved in the issues out of which the charges arose.

If the plaintiff was being tried on indictment for the offense charged in the allegation, he would be entitled to give evidence of his former good character, and have it considered by the jury in determining the question of his guilt; and it has sometimes been held in civil actions, where the party was charged with gross fraud or depravity upon circumstances merely, that evidence of uniform integrity and good character was admissible for the purpose of rebutting any unfavorable inference or presumption which might arise from the circumstances proven. See *Ruan vs. Perry*, 3 Caines, 60. But we think the rule established by the authorities is the

other way. See 1 Phil. Ev., 758; Whart. Ev., § 47; *Humphrey vs. Humphrey*, 7 Conn., 116; *Pratt vs. Andrews*, 4 N. Y., 493; *Houghtaling vs. Kilonhouse*, 1 Iowa, 530; *Gough vs. St. John*, 16 Wend., 646; *Schmidt vs. Insurance Co.*, 1 Gray, 529; *Greenl. Ev.*, §§ 54, 55. See also, *Bays vs. Herring*, 51 Iowa, 286. We think, therefore, that the district court erred in giving said instructions.

5. Plaintiff insists, however, that by filing its motion for judgment notwithstanding the general verdict, defendant waived the right to file a motion for new trial, and hence that the question as to the correctness of said instruction cannot now be considered; *Nixon vs. Downey*, 49 Iowa, 169, is relied on as sustaining this position. In that case the appeal was from the order sustaining a motion for judgment on the special findings, notwithstanding the general verdict. A motion for a new trial was also filed at the same time the motion for judgment was filed, upon which the district court made no order. The order appealed from was reversed, and it was held that the two motions were inconsistent, and could not be regarded as pending at the same time; and that, by insisting on the one, the party should be regarded as having waived the other; and that, as the time within which a motion for new trial might be filed had expired when the order was reversed, he was not then entitled to have the motion for a new trial considered. The present case is very different in its facts. The motion for a new trial was filed after the overruling of the motion for judgment, and was filed within three days after the verdict was returned. The right to file it was not waived.

For the error pointed out the judgment will be reversed, and the cause remanded for a new trial.

SUPREME COURT OF APPEALS OF VIRGINIA.

HADEN

vs.

FARMERS & MECHANICS' FIRE INS. CO.* }

Persons dealing with a corporation are affected with notice of the provisions of its charter, constitution, and by-laws.

R., in an application for fire insurance, represented his interest in the property to be a fee simple and that the property was unincumbered; his interest was in fact a life estate, and another had a reversionary interest in the land, which was insignificant in proportion to its whole value, even exclusive of the house proposed to be insured. *Held* :—

The misrepresentations were immaterial, and do not vitiate the policy.

No binding contract of insurance can be made with an agent whose powers, by the rules of the company, are limited to receiving applications for insurance and forwarding them to the company to be acted upon by its directors, who alone are authorized by its constitution and by-laws to make the contract.

Appeal from two decrees of the Circuit Court of Botetourt County, in a chancery cause in which R. G. Haden is complainant, and the Farmers & Mechanics' Benevolent Fire Association of Roanoke and Botetourt Counties is defendant. The first decree was rendered September 2, 1884, and the other October 25, 1884.

On the 19th of September, 1883, the appellee, a corporation created under the laws of Virginia, sent its agent, one R. P. Kyle, to the house of the appellant, in the county of Botetourt, to solicit an insurance of the said house and of the furniture and household property therein. The said agent examined the house and household furniture, and valued the dwelling-house at \$1,800 and the furniture at \$300; and fixed the insurable value of the former at \$1,200, and of the latter at \$200; making the total insurable value \$1,400; and estimated the amount of premium and charges for such insurance to be six dollars, which the appellant then and there paid to the

* Decision rendered, September 24, 1885.—From *Virginia L. J.*

said agent, who was one of numerous agents of the said association in the counties of Roanoke and Botetourt, whose power and duty was to solicit applications for membership, by insuring in said association, by filling up the blanks in a printed form of application, to be signed by the applicant, and to be forwarded with the premium paid for the proposed risk, to the secretary of the association, upon the express condition and understanding that the application had to go before the board of directors or executive committee of the said association, to be passed upon and approved by them before the secretary could issue a policy of insurance and complete the contract of insurance. The application, in printed form, was filled up by Kyle with the answers of the appellant, and was signed by the latter and delivered to Kyle, together with the premium, six dollars, to be sent to the secretary of the association. If it should be approved, then the secretary would issue a policy of insurance on it; if it should be rejected, it was to be returned, together with the premium, to the appellant. Kyle retained application until November 3, 1883, when he forwarded it to the secretary at his office at Cloverdale, in Botetourt County, with information that the dwelling-house and furniture had been consumed by fire on the 1st November, 1883. The secretary referred the application to the executive committee, which did not approve it, the property having been destroyed by fire, but referred it to the whole board of directors, who disapproved and rejected it, and returned it, together with the premium, to Kyle, who tendered them to appellant, who refused to receive or accept either, and made a formal demand upon the appellee for the amount of the alleged insurance, which being refused, the appellant filed his bill in the Circuit Court of Botetourt County for specific performance of the alleged contract of insurance, and for general relief.

The defendant demurred and answered, averring that Kyle made no contract to insure the complainant's house and furniture; that he had no authority, as their agent, to make such contract; and that, if he did make such contract, and was authorized so to do, the contract was null as to the said house, because the complainant, in his application, had represented his title to be fee simple, whereas it was only an estate for his own life. The court overruled the demurrer, and adjudged the complainant entitled to recover the value of the furniture, but that he was not entitled to recover anything for the house, because the contract of insurance was null as to the house, by reason of complainant's misrepresentation of his title. In October,

1884, the appellant filed his "petition for review and rehearing" of the said decree for alleged errors on its face. To this petition the appellee demurred and answered, and the court sustained the demurrer and affirmed the said decree. From these two decrees the appeal was taken.

HADEN & HADEN, *for Appellant.*

G. W. HANNBROUGH, *for Appellee.*

FAUNTLEBOY, J., after stating the facts, delivered the opinion of the court.

The error assigned by the appellant is, that the circuit court erred in decreeing that the contract of insurance was null and void as to the dwelling-house, because the appellant had misrepresented his title to said house as fee simple, when it was only a life estate. On the other hand, the appellee asks this court to consider the whole record under the IXth Rule, and reverse the decree of September 2, 1884, for error against the appellee, and amends the said decree so as to make it as the circuit court should have entered it.

The appellee is a corporation created by an act of the General Assembly of Virginia, passed April 2, 1873, and amended April 7, 1882, with power to insure its members against loss by fire, and to pay the same by assessments upon its members. It is of the plan denominated mutual; and, as its name imports, it is a local association, purely and solely, for benevolent purposes—organized for self-protection of its members only. By its charter it is authorized to make ordinances, by-laws, and regulations for the government of all under its authority, and for the management of its business; and it has done so. Its rules as to receiving members and taking risks are strict, and its agents are limited to the mere and narrow authority of receiving applications and premiums for membership and forwarding the printed forms of application filled up by the proposals of the applicant and signed by the applicant, together with the premium, for the action of the board of directors, who, by the sixth section of their constitution, have the sole and exclusive power to receive members by approving, in their discretion, applications for insurance and to issue policies; which duty the said board of directors usually discharge through its executive committee. Its officers consist of a president, vice-president, secretary, and treasurer, and so many directors as its by-laws may provide for. It is, and has been, the rule and practice of the association that no insurance shall ever be made except by a policy issued upon an appli-

cation duly made, in its printed form, with the blanks filled up with the proposals of the applicant, signed by the applicant, and presented to the board of directors for their approval, or rejection, commonly acting through their executive committee.

Kyle was, on the 19th day of September, 1883, an agent of the association, with power only to take the formal application of the appellant, which does not purport to be a contract, but only his proposal for a contract of insurance, and to forward it to the board of directors, through their secretary, for their approval or rejection; he had no power to bind the association. And the appellant, in dealing with the said association, through him, was bound to take notice of its charter, constitution and by-laws: *Bockover vs. Life Association of America*, 77 Va. (2 Hansbrough), 91, quoting from *Rolfe vs. Rundle*, 13 Otto, 222.

This court, in *Woody vs. Old Dominion Insurance Co.*, 31 Gratt., 371, says: "The courts of Massachusetts give the greatest effect to the by-laws of a mutual insurance company in restricting the powers of its officers."

We think the circuit court erred in holding that the appellant had misrepresented his title to the property sought to be insured;—either by his answer to the 9th question—"What is your title to, or interest in the property to be insured?" viz: "Fee simple;" or by his answer to the 10th question—"Is your property incumbered?" viz: "None." The appellant undoubtedly acted in the most perfect good faith, and his interest in the house to be insured was substantial and exclusive against any and all others for his life; and his contingent or reversionary interest might, at any time, have become a fee-simple interest; while the only incumbrance was a claim of his sister, Mrs. Hood, to a reversionary interest in the land, which was insignificant and unimportant in proportion to the value of the whole land—exclusive of the house. Such as it was, however, technically the record shows that he stated the facts to the agent Kyle, who filled up the blanks with his answers "Fee simple" and "None." The misrepresentation, if any, was simply technical and unintentional; and was immaterial, withal. "Any material misrepresentation will avoid a policy:" *Flanders on Insurance*, 361.

We are of opinion that the circuit court erred in overruling the demurrer to the bill—the ground of which was want of jurisdiction in the court of equity to entertain the case set out by the bill. A court of equity has jurisdiction to enforce specific performance of a contract of insurance made

with the agent of an insurance company, having authority to issue policies or to make binding contracts for said company to issue a policy, and the premium has been paid; but where before the policy has been issued, or the application has been referred to, and considered and approved by the only authority in the association which, by its charter, constitution and by-laws, can make a complete and binding contract of insurance for the company or association, the property proposed to be insured is consumed by fire, there can be no complete contract which a court of equity can enforce: *Woody vs. Old Dominion Insurance Co.*, 31 Gratt., 362; *Haskins vs. Ag. Fire Insurance Co.*, 78 Va. (3 Hansbrough), 700. But the bill must, on its face, distinctly state that such contract was made, and show when, where, how, and by whom it was made, and that the person making it had the authority to bind the company. The bill says that on the 19th of September, 1883, at appellant's house, R. P. Kyle insured appellant's house and furniture, and received the premium therefor, \$6, and that the property was destroyed by fire before the policy was issued; and that the appellee refused to issue a policy after the house and furniture were burned; and also refused to pay the appellant any part of the sums of money at which said property was alleged to have been insured by its agent, Kyle. But the bill does not state, distinctly or sufficiently, that the alleged contract was by parol, or in writing; that it was by the taking of the application in writing which was signed by the applicant, and not by the appellee, or its agent, and the payment of the premium \$6; or that it was by something outside of said application. The bill does show that the appellant was badly treated by the negligence of the appellee's agent in not sending on promptly and duly his formal application and proposal for insurance to the proper authorities of the association for their approval or rejection; but the negligence or tortious conduct of the defendant, or its agent, is not ground for jurisdiction in such a case as this in equity; the contract must be distinctly stated in the bill to protect it from a demurrer; and the contract must be proved as stated in the bill: and, as stated and proved, it must be certain, fair and just, in all its parts, in order to support and maintain the bill and to entitle the complainant to relief in equity: *Haskins vs. Fire Insurance Co.*, supra. Nor does the bill charge that Kyle, the agent, had the authority to bind the appellee by his contract so averred to have been made to insure said house and furniture; and the very idea and fact of a written application taken by an agent from an appli-

cant desiring to have his property insured by the agent's principal, to be forwarded to that principal for approval or rejection, and making proposals for a contract of insurance by a policy yet to be issued or denied by that principal, is repugnant to the idea that a contract of insurance had already been made; that the formal application and terms proposed and submitted for a policy and contract of insurance, was a contract of insurance. The demurrer should, therefore, have been sustained; but, upon the evidence in the cause, the circuit court erred in decreeing that the appellant had established, by proofs, such a contract of insurance with the appellee as entitled him to relief, in whole or in part; and that he recover of the appellee the value of the furniture allaged to have been insured and which was destroyed by fire.

In the case at bar, Kyle was an agent to solicit and receive applications and proposals for insurance and to forward them, with the premiums, to his principal for acceptance or rejection. He was supplied only with printed forms of application for this end and purpose; and this was the extent of his agreement with the appellee. Negligence cannot make a contract of insurance; delay cannot make a contract of insurance: *Winneshiek Insurance Co. vs. Holzgraff*, 53, Ill., 516.

In *Haskins vs. Ag. Fire Insurance Co.*, 78 Va. (3 Hansbrough), 700, Judge Lacy says, for this court: "The fact that an application has been made for insurance, and a long time has elapsed, and the rejection of the risk has not been signified, does not warrant a presumption of its acceptance. In such cases there must be actual acceptance or there is no contract." Without a contract of insurance, this suit for specific performance cannot be maintained here, whatever might be the remedy and a relief in an action at law for damages for the negligence of Kyle. Kyle was not authorized to make contracts of insurance for the appellee; and the evidence does not show that he made one. He explains his declarations to the appellant that his property was insured; he says he told him that it would be insured if the executive committee approved his application. Doubtless, he thought and said that the executive committee would approve it; but such a prediction or declaration, made after appellant's signing the application and paying the premium, did not, and could not, constitute a contract of insurance.

The decree complained of is erroneous, and must be reversed, and the appellant's bill be dismissed.

Reversed in Part.

Hinton, J., dissents.

SUPREME COURT OF TEXAS.

Appeal from McLennan County.

NEW ORLEANS INS. ASS'N)

vs. }

GRIFFIN & SHOOK.* }

Verbal consent by the agent of an insurance company with knowledge that it will be acted upon is a waiver of the requirement that the consent to additional insurance shall be expressed in writing upon the policy. The evidence of such consent held insufficient to bind the company.

Statement.

This suit was brought by appellees on an insurance policy for \$1,000, issued by appellant company, November 16, 1881, which contained provisions as follows: "Or, if the assured shall have or shall hereafter make any other insurance on the property hereby insured, whether such insurance is valid or invalid, without the consent of the association written hereon, * * * this policy shall be void." "And it is further expressly covenanted by the parties hereto that no officer, agent, or representative of this association shall be held to have waived any of the terms and conditions of this policy unless such waiver shall be indorsed hereon in writing."

It is admitted that proof of loss was properly made and furnished the company, and that the amount of the goods destroyed was equal to the amount of the insurance, to wit: \$4,000; \$1,000 being the one in suit; \$1,000 being in the Fire Association of Philadelphia, dated November 4, 1881; \$1,000 being in the Crescent Ins. Co.,

* Decision rendered, May 1, 1886.—From *Texas Law Review*.

dated November 14, 1881; \$1,000 being in the British American Assurance Co., dated December 1, 1881.

The sole question in this case is as to whether there was a waiver of the conditions above quoted, which would bind the appellant company. The following is the evidence adduced upon that issue:—

Wallace Rivirie testified: Was in plaintiff's store November 13, 1881. Griffin requested me to procure for them a policy of insurance for \$1,000 in Waco agency. Came to Waco that night. Saw J. G. Harrison, the agent of appellant. Told him Griffin & Shook wanted \$1,000 insurance on their stock. Told him that when they were able they would carry more insurance. Harrison replied: "I wish you would let me write up the policies for you." The next day he gave Harrison plaintiffs' policy to copy from. "Question: When you told Harrison that when plaintiffs were able they wanted to carry more insurance, did you state the exact amount? Ans. I think I said \$4,000. Ques. Do you not know whether you so stated? Ans. I think I said so."

Griffin testified: I sent Rivirie the policy in the Fire Association. I got it from Lowery & Lowery, of Hillsboro. I sent it that the description of my property therein might be copied into the policy he was to get me in Waco. I was in Waco a week or ten days after I got my policy in the New Orleans company from Harrison, and paid Harrison the premium on it. (This was the policy which had been obtained by Wallace Rivirie at the instance of appellees, and is the policy in controversy.) I then told Harrison that when I was able I intended to carry \$4,000 of insurance. He said he would like to write it up for me. Sent policy to Harrison before I made application in Crescent. I did not get my policy until some days after November 14, 1881. It bore that date. I got the policy in suit first. Question: "You say you know you told Harrison you wanted to carry \$4,000 insurance when you were able, why can you not answer with equal certainty as to whether you gave information to him at the time about your policy in the Crescent Company?" Ans. "Well, sir, I think I told him." Question: "Will you not answer that you know that you did or did not tell him?" Ans. "I think I told him. I am satisfied I did."

J. G. Harrison testified: Griffin came to my office a week or ten days after I wrote him the policy in the New Orleans Insurance Association. He then paid me the premium on it and said he intended to carry \$4,000 insurance when he was able. I told him I would like to write it up for him. Rivirie did not tell me the amount of

insurance appellees wanted. Question: "Did you not tell me (counsel for appellees) on yesterday that if Rivirie ever told you that Griffin & Shook wanted to carry \$4,000 insurance you did not remember it?" Ans. "I did, and I say the same thing now. He did not tell me the amount of insurance they intended to carry. He only said that when they were able they would carry more insurance. If Griffin had told me about his insurance in the Crescent Company I should have remembered it. I should have remembered that as well as I do what he did say, that he intended to carry \$4,000 insurance when he was able."

JENKINS & JENKINS, *for Appellant.*

JENNINGS & BAKER, HERRING & KELLY, *for Appellees.*

ROBERTSON, J.

A condition in a policy of insurance requiring notice of any other insurance afterward taken upon the same property is to enable the company to exercise its option to continue or cancel its contract.

Such condition may not be complied with by notice of an intention to obtain other insurance, because such notice does not give it the opportunity contracted for: *Healy vs. Ins. Co.*, 5 Nev., 268; *Kimball vs. Ins. Co.*, 8 Gray, 33. But a condition that other insurance shall not be obtained without the consent of the company is better fulfilled by obtaining the consent before than after the contract for additional insurance. Such a condition is satisfied by notice of an intention to take other insurance consented to by the agent of the company: *Carrugi vs. Ins. Co.*, 40 Ga., 135.

Verbal consent by the agent with knowledge that it will be acted upon is a waiver of the requirement that the consent shall be expressed in writing upon the policy: *idem*, and *Crescent Ins. Co. vs. Griffin & Shook*, 1 Texas Law Review, 326.

The condition in the policy in suit is of the character last described. If the plaintiffs gave Harrison notice of their intention to obtain other insurance, and he consented with knowledge or notice of their purpose to act upon the verbal consent, the condition relied upon by the defendant will not avail it. Whether the policy issued by the Crescent was prior or subsequent to the one in suit, or contemporaneous with it, need not be considered: 30 Md., 109.

The last policy obtained by the plaintiffs, issued by British Am. Assurance Co. on December 1, 1881, was other insurance obtained after the contract with defendant, which avoided that contract by its

terms unless (interpreting the condition) the defendant's agent consented to such other insurance and waived the written indorsement.

Did the agent consent to the contract with the British Company?

It was not necessary for him to be advised of the name of the company : *Benjamin vs. Ins. Co.*, 17 N. Y., 414. If he assented to any insurance to be afterward obtained, the substance of the condition is fulfilled. No more insurance in all was obtained than the sum mentioned in both interviews with Harrison.

That the property to be insured was that covered by the defendant's policy is sufficiently certain. If he consented at all it covered the British Company policy. No express consent was given. If there was any, it is to be inferred from what was said in two conversations. In both these conversations the plaintiffs stated that they intended to take out additional insurance when able. In both the agent expressed his desire to write the policies. It is plain that if Rivirie and Griffin knew the condition of the policy, each knew that he had not received the prescribed consent, and the plaintiffs knew that in obtaining additional insurance they were violating the contract. To give effect to the contract on this hypothesis would annul the condition.

The requirement of consent to other insurance is not arbitrary, but reasonable and proper. Through it the company reserves the right to determine how much of the risk shall be carried by the assured. The public, as well as the assurer, is interested in preventing a situation in which a fire would be profitable to the assured : *Carpenter vs. Ins. Co.*, 16 Pet., 510. The provision that the consent shall be indorsed in writing upon the policy is valid. Unless this is waived, the verbal consent is not sufficient. The substance of the clause is the consent, the indorsement will be dispensed with on proof of any facts which would make it unfair to the assured for the company to claim that the verbal consent was not sufficient. In this case, if the plaintiffs understood the condition, there was absolutely no proof of any fact justifying them in believing that any part of it would not be insisted upon. If the plaintiffs intended that Rivirie should obtain the consent for them, the policy informed them a few days afterward that he had failed to do so. If Griffin intended in his subsequent interview to comply with the condition, if what was said was sufficient to justify the belief that the agent consented to the additional insurance, there was nothing to persuade him that the indorsement was waived.

The agent did not have the policy,—the plaintiff could not, there-

fore, assume a waiver from the failure to make the indorsement. If all the parties knew and understood the condition, the plaintiffs could not fairly believe that its terms were either complied with or waived by what occurred at either of the proved interviews. The fact is that the majority of men contracting for insurance know little of the contents of the policy, until a clause in fine print is presented as a defense in adjusting the loss. The agent, however, is generally familiar with all the conditions of the contract. For this reason the agent, upon the commonest principles of honesty, encouraged and enforced by the courts as universally as practicable, is required to do what the policy prescribes shall be done to preserve the contract when notified of the facts. It is highly probable from what was said by Rivirie and Griffin that neither was acquainted with the condition in the policy requiring written consent to other insurance, and that it was not the purpose of either in what was stated to comply with any such condition. Nevertheless, if the agent was advised by either of them of the purpose of the plaintiffs to obtain other insurance, it was his duty to consent and make the required indorsement, or to signify his dissent. This would certainly be the case if he knew, or from what was stated might reasonably have inferred, that the plaintiffs did not know that their contemplated action would vitiate the policy.

"If the agent be in fact informed, and do in fact consent, and the insured, relying on that consent, do, in good faith, pay out his money, it does not make the policy void:" *Currugi vs. Ins. Co.*, supra. * * * "It would but be the perpetration of a fraud to permit the company to take advantage of its own wrong and escape liability because its agent has failed to do his duty to the insured : " *idem*.

What occurs must be sufficient to make it unfair for the company to insist upon the defense. It would be unfair if the agent has not done his duty. It was the duty of the agent to consent and make the indorsement, or to refuse to do so, if he was informed of the plaintiff's purposes.

But, what was said to him cannot be held to have given him the information. The purpose as stated, if it could be called a purpose, was uncertain in time and conditioned upon a situation which might never arise. The utmost that could fairly be derived from the agent's remark was that he was then willing that the additional insurance should be written or that he would, not does, consent when and if the given situation comes about. What was said to him im-

posed upon him no obligation to consent or refuse, and what he said can be construed neither as a consent nor as waiver of any condition in the policy. He was not advised, and had no reason to believe that what transpired in either interview would be accepted or acted upon as a consent : *Ins. Co. vs. Hurd*, 37 Mich., 11. He was never informed of the fact that the additional insurance had been obtained, and knew nothing of it until after the fire. He did not mislead or impose upon the plaintiffs in any way, and for the loss of this much of their supposed indemnity they can find the only cause in their own willful or negligent disregard of the terms of their contract.

The facts relied upon to show consent to the additional insurance, and a waiver of the indorsement, are proved by the witnesses upon both sides without any disagreement between them as to those considered in this opinion, and all are considered that are urged in support of the judgment of the district court.

The conclusion of the court below upon these facts cannot be sustained, and the judgment must be reversed; and as it is apparent that the plaintiffs' case was fully developed and cannot on another trial be improved, it is here adjudged that the plaintiffs take nothing by their suit, and that appellant go hence without delay and recover the costs of both courts.

Reversed and remanded.

SUPREME COURT OF TEXAS.

Appeal from Dallas County.

HAMBURG-BREMEN FIRE INS. CO. }

vs. }

M. D. GARLINGTON.*

Where the thing insured is a two-story, frame "building," which is shown to mean a house, and which was used as a hotel, and it was so destroyed by fire as to cease to be a "building" within the meaning of the law, the policy evidences a liquidated demand against the insurer for the amount of the policy.

It is unimportant that the building may have been injured by a former fire while covered by other policies which had been paid. Such injury can have no bearing on the question of liability under policies subsequently issued.

Where the building insured was injured to the extent that it could not be repaired by reason of a city ordinance preventing buildings injured to a certain extent from being repaired, the loss was total within the meaning of the policy.

Tried before Hon. G. N. ALDREDGE, District Judge.

Statement.

This suit was brought by appellee on a policy of insurance for \$1,000 on a two-story, frame building occupied as a boarding-house, situated on the north side of Main Street, Dallas, Texas, and a recovery had for \$923.75.

The conclusions of fact found by the court are substantially these :

1. Prior to January 4, 1884, appellee had the building insured

* Decision rendered, April 20, 1886.—From *Texas Law Review*.

for \$3,500, \$1,000 of which was with the appellant company. The building was within the fire limits of the city of Dallas.

2. On said day the building was damaged by fire to the extent of \$1,500, which was paid, and the policies canceled. On that day the building was worth \$4,200 to \$4,500.

3. After the fire, and before January 23, appellee had obtained permission from the city authorities to repair the building, and had material on the ground for that purpose.

4. On January 23, 1884, appellee insured the building for \$3,277.96, one of the policies being the one in suit in this case.

5. On January 24, 1884, a second fire occurred by which said building was damaged. The amount required to put the building—after the second fire—in condition it was before the second fire, was \$561.02. This the companies expressed a willingness to pay, but made no formal tender.

6. After the second fire appellee applied to the city engineer for permission to repair the building, which was refused.

7. Said building was at that time dangerous, and was a nuisance. It had lost its specific character as a building, was unfit for use, and was a total loss, this total loss being the combined result of the two fires. The building in its then condition was worth less than 66½ per cent of its value before the first fire.

8, 9, 10. A few days after the second fire the mayor, acting under the ordinances of the city, ordered the building torn down as a nuisance.

11. After this order was issued appellee sold the building for \$100 and the purchaser took it away.

12. The building was valuable only for the unburned material left in it, and was worth only \$100 by reason of the fact that under the laws of the city it could not be repaired.

13. One of the companies paid \$230 in settlement of a policy for \$277.96.

14. Proofs of loss were duly furnished.

15. That considered with reference to the condition of the building at the time the second insurance was effected, the loss in this case was not a total one, although the loss occasioned by both fires, and under the ordinances of the city preventing repairs to a building that had been damaged 33 $\frac{1}{3}$ per cent of its value, it was a total loss.

The conclusions of law are as follows: "That the contract of insurance of said January 23, must be construed with reference to the ordinances of the city, with reference to repairs within the fire limits in said city; that they entered into and became a part of the contract of insurance. The actual damage to plaintiff by reason of said second fire and by reason of the said ordinances was the amount of the judgment in this case multiplied by the figure three, and adding the amount received, \$230, and deducting the \$100 for which the building was sold. This loss was the natural and proximate result of said second fire, and was such a result as must have been in contemplation of plaintiff and defendant at the time said insurance was effected.

CRAWFORD & CRAWFORD, *for Appellant.*

LEAKE & HENRY, *for Appellee.*

STAYTON, J.

The rights of the parties must depend on the character of the loss sustained while the policy issued on January 23 was in force. The thing insured was a two-story, frame "building" on Main Street, in the city of Dallas. By the term "building," used in the finding of facts, we understand to be meant a "house," which it is shown had been used as a "hotel." It was destroyed by fire, and if the loss was total by reason of the fact that the building insured was thus so destroyed that it ceased to be within the meaning of the law a "building," then, under the laws of this State, the policy evidences a liquidated demand against the appellant for the full sum for which the policy was issued: R. S., art. 2,971; *Queen Ins. Co. vs. Jefferson Ice Co.*, 5 Texas Law Review, 731.

The court below found that the effect of the fire, which occurred the day after the policy was issued, was to reduce the building to a condition as follows: "The east wall of it was entirely destroyed; the roof was destroyed; almost one-half of the interior of it (extending from the foot of the east wall to the top of the west wall) was destroyed; the front of it was partly lying on the street, and partly hanging, liable to fall at any time." Thus it had lost its specific character as a building, and was unfit for use as a hotel or for other

purpose, and was a total loss; this loss being the combined result of the two fires. It is unimportant to what extent the building may have been injured by the former fire, which occurred on January 4, 1884, while the property was covered by other policies, for settlements had been made in reference thereto and those policies canceled, and such injury can have no bearing on the question of liability under policies subsequently issued.

When the policy sued upon was issued, the property may have been seriously injured by the fire which occurred before that time, but such was the condition of the property when the policy sued upon issued that the appellant insured it as a building, and such, in the absence of averment and proof of fraud in procuring the policy, it must be held to have been at the time the policy issued.

The question then is: Did fire so change the character of the thing insured, after the policy sued upon was issued, as to work a total loss of the building within the meaning of the contract of the parties? The court below found that the building was a total loss and we are of the opinion that the facts stated in the finding justified that conclusion. It was the building that was insured; a specific thing, and not merely the material of which it was constructed.

In the case of *Williams vs. Hartford Insurance Co.* (54 Cal., 450), the following charge was approved: "A total loss does not mean an absolute extinction. The question is not whether all the parts and materials composing the building are absolutely, or physically destroyed, but whether, after the fire, the thing insured still exists as a building. Although you may find the fact that after the fire a large portion of the four walls were left standing, and some of the iron-work still attached thereto, still if you find that the fact is that the building has lost its identity and specific character as a building, you may find that the property was totally destroyed within the meaning of the policy."

This we understand to be the true rule: *Nave vs. Ins. Co.*, 37 Mo., 430; *Judah vs. Randall*, 2 Cain's Cases, 324; *Ruck vs. Ins. Co.*, 127 Mass., 309; *Ins. Co. vs. Fogarty*, 19 Wall., 640; *May on Ins.*, 421, note a; *Grady vs. Ins. Co.*, 11 Mich., 446.

The fact that the court found that the total loss resulted from both fires cannot affect the liability of the makers of the policy in force at the time the total loss occurred. The fire which consummated the total loss did not occur until after the policy sued upon was issued, and the defective condition of the building brought about and existing through the former fire can no more be taken

into the estimate in determining the cause of the total loss than could any other character of defect in the building, existing at the time the last policy issued, and not of a nature to defeat the policy, but calculated from its character to make total loss from fire thereafter more easily accomplished.

The maker of the policy cannot call to its aid the injury done by the former fire to make a loss subsequently resulting from fire only partial, which in fact, through the latter fire only, became total. The loss insured against was the loss to the building as it was at the time the policy issued upon issued, or as the building might be subsequently bettered, and its former condition could not be looked to for the purpose of determining the character of the loss, and the court might well have rested its holding, that the building was a total loss from the last fire, upon the specific facts found to be true. The court, however, as will be seen from the conclusions of fact and law, based the total loss on both fires and the ordinance of the city which prohibited the rebuilding or repairing of wooden houses within the fire limits which might be damaged to the extent of one-third of their value by fire.

The fifteenth conclusion of fact was: "That considered with reference to condition of the building at the time the second insurance was effected, the loss in this case was not a total one, although the loss occasioned by both fires, and under the ordinances of the city preventing repairs to a building that has been damaged 33½ per cent of its value, it was a total loss."

Upon this conclusion of fact the court adjudged, in effect, that the loss resulting from the second fire, and the operation of the city ordinance which forbade the repair or rebuilding of the insured building, was a total loss; the natural and proximate result of the second fire had in contemplation by the parties at the time insurance was effected, and on this ground gave judgment as for a total loss. If rendering the judgment on the theory of total loss the judgment, as it seems, was rendered for a less sum than it should have been under the policy, this is a matter of which the appellants cannot complain.

After the second fire application was made to the city authorities repair the building, and such permission was refused on account of an existing ordinance which forbade the repair or rebuilding of any wooden building within the fire limits destroyed to the extent of one-third of its value by fire; no question is made as to the validity of such an ordinance.

The case of *Brady vs. Insurance Co.* (11 Mich., 445), in its facts was almost identical with this, and in that case it was held that the parties having contracted in view of a city ordinance which prohibited the reconstruction or repair of a wooden building situated within the fire limits, unless by leave of the common council, which had been refused, the fire must be deemed the proximate cause of the loss and the loss total. We see no reason to doubt the correctness of this conclusion.

The case of *Brown vs. Insurance Co.* (1 Ellis & Ellis, 853) is substantially to the same effect.

From these views it is unimportant that the court below based its judgment on the ground last stated, and, in effect, held that the loss was not total except as considered in reference to the inability to repair or rebuild in consequence of the extent of injury done by the second fire, which of itself, under the specific facts found to be true, we hold caused a total loss without reference to the fact that the building under the city ordinance could not be repaired or reconstructed.

In any event the judgment was right and must be affirmed.

Affirmed.

SUPREME COURT OF MICHIGAN.

ALONZO CHESBROUGH AND JOHN CARLTON

vs.

HOME INSURANCE COMPANY.*

The policy provided that the insured should maintain insurance on the property to the extent of four-fifths of the value, and in case of failure so to do "the assured shall be a co-insurer to the extent of such deficit, and in that event shall bear his, her, or their proportion of any loss;" but that in case the insurance exceeded such four-fifths, the assured should not recover from the company more than its pro-rata of the cash value of the property.

The insured failed to maintain other insurance to the extent of four-fifths, the deficiency being about \$10,000.

Held, That the company was not a co-insurer with the insured of the deficiency so as to make the company bear \$5,000 of the amount, but that the insured was an insurer to the extent of the whole \$10,000, and must contribute to that extent with the company.

This was an appeal from the Circuit Court of the County of Bay, in which the following charge was delivered by the court.

CHARGE OF THE COURT BELOW.

Gentlemen of the Jury:—

The facts in this case have been agreed upon by the counsel, and there is no dispute of what they are, and the conclusion which they arrive at upon the hypothesis adopted by each respectively, is also agreed upon. There is no dispute about what the result would be, provided the court shall be of the opinion that the plaintiff or defendant is right in the construction of this instrument. Courts have frequently been required to determine the proper construction of

* Decision rendered, May 11, 1886.

the various clauses in insurance policies. These policies are prepared by the insurance companies with just such provisions as they see fit to incorporate in them. But when they incorporate provisions for their own benefit and protection in clear and distinct language, without ambiguity, capable of only one construction, the condition must be lived up to by the assured in order to have the benefit of the insurance according to contract. But where language is used which may be construed to mean one thing or another, or may be used or applied so as to operate for the benefit of the insurer or the insured, the rule of construction is that it must be taken to operate most strongly against the company which is the insurer. Now, in considering this clause of the policy which has been read in your hearing in regard to the "co-insurance," the question arises whether the term "co-insurer" there applies to insured and insurer, or whether it applies to the assured and other companies who may be or become insurers. A co-insurer is a joint insurer in the same insurance, and becomes a party to the same obligation.

Men may execute different instruments for the purpose of accomplishing the same purpose of furnishing the same security different bonds, one signing one obligation and one another, but that does not make them co-obligors; but if two persons join in a bond, they thereby become co-obligors. Now it is not assumed that the assured in this case became a joint insurer with either of the other companies; but it is assumed that there being other insurance in contemplation at the time "co," as used in this policy, was intended to and does mean a joint insurer with all the other insurers of the same property as that insured by this company. That is what is claimed.

It seems to me that the plaintiff cannot be legally regarded as a co-insurer with the other parties that insured that same property. They could insure upon their own terms, and the obligation of each of the companies insuring would be determined according to the terms of their respective policies, and if they incorporated such a provision in their policies as is incorporated into this, why they would be governed by it according to its proper legal construction. There is one policy, it is said, wherein no such provision is included. The proportion of loss to be paid by that company would be according to the amount insured, in its relation to the other amounts insured by the different companies.

Then the question arises whether the construction which the

plaintiff claims here is a reasonable and natural construction. If it was intended that these plaintiffs insuring their property subject to the terms and conditions of the policy, should be co-insurers with the defendant, so as to sustain a part of the loss in a certain contingency, that would make them strictly co-insurers of this property.

Then as to the manner of adjusting the liabilities upon this construction. I think the counsel for the plaintiffs here have pointed out the way and the practical result of carrying out this construction; and it seems to me that this construction harmonizes more clearly with the language than any other construction of this instrument. But we are to look to the objects and purposes of this insurance and its effect in considering it. It is said on the one hand that if this construction prevails then the insurance is extended in a certain event, and may embrace more than five thousand dollars of insurance.

The insurance upon the face of it is to the amount of five thousand dollars, and in no way could be had beyond that amount in any event. But if the company are to be considered a co-insurer with these plaintiffs, their proportion of the loss would be increased in case of small or partial loss. But suppose these plaintiffs failed to insure up to four-fifths of the value and four-fifths of the property was lost, or it was entirely lost, then in adjusting this loss, this defendant would upon this construction, demand that one-half of this co-insurance, which in this case amounts to ten thousand dollars, one-half of it should be born by the plaintiffs, and they concede that to be the result. So if the loss should be large the insurer would have the benefit of it; if small, then the insured is to have the benefit of it so far as this proportion is concerned. Now, this may not be very unreasonable that the proportion should depend upon the amount of the loss.

Mr. Hanchett. Our argument is that in no event would the defendant pay above five thousand dollars.

The Court. I understand that, but in case there should be a loss to the amount of four-fifths, then their proportion without any reduction would be five thousand dollars.

Mr. Hanchett. That is if there was a four-fifths insurance.

The Court. I say then if there was an amount uninsured, part of which was the loss of the plaintiff that would be deducted.

Mr. Hanchett. That is to the extent that the plaintiff would be the insurer.

The Court. Yes, to that extent. So that can be calculated.

Now with this explanation, gentlemen, I charge you as requested by the plaintiff. Counsel have agreed that upon the assumption that this construction is the true one as determined by the court, the amount which the defendant is liable for and which the plaintiffs have the right to recover is the sum of \$1,329.57, and this under the ruling of the court, must be your verdict.

Gentlemen of the jury, you say that the defendant did undertake and promise in manner and form as the said plaintiffs have in their declaration in this case complained against it, and you assess the damages of the plaintiffs on occasion of the premises at the sum of \$1,329.57. So say you all.

On the other side the requests are refused.

CAMPBELL, C. J.

In this case the defendant issued a policy to plaintiffs to the amount of \$5,000 upon their stock of lumber upon their docks at Au Sable in Iosco County. On the 16th of May, 1885, there was a loss by fire to the amount of \$6,328. The total value of the lumber on hand was \$37,148.23. Other policies were in existence to the amount of \$14,000, which it is admitted were to be considered in dividing up the loss among the insurers. But it was claimed and admitted that the plaintiffs themselves were bound to carry a further amount of insurance which should also contribute, and the only question presented by the record is how much they should contribute. It depends upon a written clause in defendant's policy, which ran as follows:—

“It is a part of the consideration of this policy, and the basis upon which the premium is fixed, that the assured shall maintain insurance on the property hereby insured by this policy, to the extent of four-fifths of the actual cash value thereof, and that, failing so to do, the assured shall be a co-insurer to the extent of such deficit, and in that event shall bear his, her, or their proportion of of any loss. It is, however, mutually understood and agreed, that in case the total insurance shall exceed four-fifths of the actual cash value of the property insured by this policy, the assured shall not recover from this company more than its pro-rata share of the whole actual cash value of such property.”

In the present case, four-fifths of the value of the lumber was \$29,718.56. The combined policies, including defendants', amounted to \$19,000, leaving a deficit in the sum agreed to be kept insured, of \$10,718.56. The defendants insist that they are not concerned

whether plaintiffs insured fully in other companies, or carried the insurance themselves. Plaintiffs claim, and the court below held that defendant, to the extent of \$5,000, was bound to bear half of the deficit, so as to be a co-insurer with plaintiffs for half the amount not insured elsewhere. This would, in the present case, put the defendant practically on the same footing as if it had insured to the amount of \$10,359.28 instead of \$5,000.

The only basis for this argument is the use of the word "co-insurers," which, it is claimed, made defendant and plaintiffs joint or equal insurers to the amount of any deficit which plaintiff saw fit to leave uninsured. This construction appears to us unnatural and unreasonable. It nullifies the whole effect of the plaintiffs agreement to keep up insurance to the amount of four-fifths, and enables him, by violating that agreement, to throw one-half of the burden of his default on the defendant, which can have no means of protecting itself against plaintiffs' misconduct. In the present case, if plaintiffs had neglected to procure any additional insurance at all, defendant, on that theory, would have been compelled to stand insurer to the amount of over \$17,000, and consequently been bound to pay nearly three-fifths of the entire loss.

It seems to us the meaning of the clause in the policy is very clear, and holds plaintiffs bound either to procure from others, or to carry themselves insurance to the extent, with defendant's policy of four-fifths of the value of the insured property. The undertaking is positive and unequivocal that they shall keep the property insured to that extent, and that they shall themselves be treated as insurers for all that others do not insure. The word "co-insurers" means neither more nor less than fellow insurers, and is used to put plaintiffs on the same footing with other insurers who issue policies and contribute ratably in case of loss. It cannot mean that defendants are to be made jointly responsible with plaintiffs for any default which plaintiffs see fit to make. All persons issuing policies on the same property are known as co-insurers, and they are never jointly liable, but their proportion of liability depends on the amount which each insures. The difference between what was actually insured and four-fifths of the value of the property covered, was the amount insured by plaintiffs, and for which they became in the language of the policy, "co-insurers." Angell on Ins., Sec. 26-88. If that word is at all ambiguous, the policy shows plainly what was intended. The judgment rendered below was excessive, for the reason that it made defendant bear more than its portion of the

loss. The computation acted on below made defendant liable originally and without interest for \$1,300. The proper sum was \$1,-064.73, and interest on that to the date of the finding below is \$24.23, making the proper sum due them \$1,088.96. The judgment below was excessive to the amount of \$240.61.

The judgment below must be reversed for the excess over \$1,088.96 and affirmed as to the balance. Defendant will recover costs of this court.

SUPREME COURT OF VERMONT.

GENERAL TERM, 1885.

GRANITE STATE MUT. AID ASS'N

vs.

PORTER & DUBOIS, COMMISSIONERS.

Under the provisions of Sec. 3,607 R. L., as amended by No. 45 of the acts of 1884, a mutual or co-operative life insurance association not organized under the laws of Vermont, is not entitled to a license to transact business unless it has assets amounting to \$100,000, and as much more as is necessary to balance its outstanding liabilities, such liabilities computed and such assets invested as provided by said statute.

Petition for mandamus.

The petition set forth, in substance, that the petitioner was a corporation chartered under the laws of the State of New Hampshire; that it was organized for the purpose of doing life insurance business on the mutual or co-operative plan; that it had, December, 1884, two thousand five hundred and seventy-one contributing members, and now has a greater number; that the laws of New Hampshire required said corporation to make annual returns, under oath, of the business of the association, which requirement it had complied with; that it has been and is of sufficient ability to pay, and has paid its stated benefits in full; that it had filed with the secretary of State of Vermont all the stipulations and papers required by the laws of Vermont and had made application to the defendants for a license to transact business in this State, and had tendered the defendants all the legal fees and charges for the granting of such license; that the defendants had refused to issue a license to said company and solely upon the ground that under the laws of Ver-

Opinion filed, May 1, 1886.

mont it had not sufficient assets, that is \$100,000, and such further assets as would balance the outstanding liabilities of said company, to entitle it to a license.

The prayer was that a writ of mandamus issue commanding the defendants to issue such license.

The answer of the defendants admitted all the allegations of the petition; and further set forth that in the opinion of the defendants, they were not authorized to issue such license.

C. B. & C. F. EDDY, for petitioner.

There is no controversy as to matters of fact in this case.

The answer admits all the material allegations of the petition.

The only question for this court is as to the interpretation of Sec. 3,607 R. L. as amended by No. 45 of the acts of 1884. (Statute referred to quoted.)

This action, before the amendment, clearly defined the "co-operative insurance companies, associations, or societies," not organized under the laws of this State, that were not authorized to transact the business of such "companies, etc." in this State.

The enactment was that such a company "shall not transact the business of such a company in this State, unless it has assets amounting to one hundred thousand dollars, invested, etc."

The word "unless" and the words following it, open the door and make it lawful for such company, association, or society, to transact their business in this State, if qualified by assets as described. It was clearly the legislative intent by the amendment put into this section by the act of 1884, to make it lawful for another class of companies to transact their business in this State. The language used admits of no other construction; it clearly and unmistakably defines the other class, and demands certain described qualifications—not in addition to the requisites described in the original section,—but in lieu thereof.

The first word of the amendment, "or," has its significance in connection not only with what follows it but with the word "unless" in the original section, to which it refers. "Or" is a connective, and it and the provisions following it clearly mark an alternative.

The provisions preceding "or" in the original section, define one class of such "companies, etc." and the following provisions as clearly and unmistakably define another class, that are authorized to transact business in this State.

There is no ambiguity. There is nothing for the court but to

declare the plain, unequivocal meaning of the language of the entire section: *Blair vs. Ellsworth*, 55 Vt., 418.

PITKIN & HUSE *for the Defendants.*

ROYCE, C. J.

The only question presented in this case is the construction to be given to Sec. 3,607 R. L., as amended by No. 45 of the acts of 1884. Before amendment, that portion of Sec. 3,607 which is applicable, read as follows: "A mutual insurance company or co-operative insurance company, association, or society, not organized under the laws of this State, shall not transact the business of such company in this State unless it has assets amounting to one hundred thousand dollars, invested in securities readily convertible into cash, not less than one-half of which is invested in cash securities other than mortgages of real estate, nor unless it has such assets equal to its outstanding liabilities, including re-insurance, to be estimated as in the case of joint-stock insurance companies above named, and including the amount of guaranty capital as a liability; nor until the laws of this State relating to insurance companies of other States have been complied with," etc. The clear import of this language is that in order to entitle it to a license to conduct business in this State, as provided in Sec. 3,611 R. L., the applicant company must show assets to the amount of at least \$100,000, and so much more as may be necessary to balance its outstanding liabilities, such liabilities to be computed, and such assets to be invested, as is provided in the section.

It is well known that in mutual fire insurance companies ordinarily, if not universally, the bulk of assets consists of premium notes, and as the amount of these is graded according to the amount of insurance in force, this language is obviously adapted to that class of companies; and as mutual life companies accumulate assets in proportion to the business transacted, it is equally applicable to them. Its requirement is simply that the company shall be of such standing and consequence that it can show at least \$100,000 of assets, and that the investment of its assets and proportion of resources and liabilities shall conform to the standard established by the law. With co-operative insurance companies the conditions are different. Beyond such paid-up capital or reserve fund as they may have, if any, the amount of their tangible assets is ordinarily inconsiderable if not entirely absent. They are simply based on the mutual agreement of the members of the association to respond

to assessments for the payment of losses in such manner as is provided by the rules of the company or association, and the failure to do this operates to cancel the insurance of the member so failing to perform his part of the mutual agreement. In the case of a co-operative company, then, supposing it to have a paid-up capital or reserve fund of \$100,000, whenever its liabilities exceeded that amount, upon the basis prescribed by the law, it would ordinarily become impossible for it to comply with Sec. 3,607 so as to establish its right to a license; and the larger its membership and correspondingly stronger its real condition, the wider the breach, because the larger the membership the larger would become its liabilities, with no corresponding increase in any kind of assets recognized by the law.

A consideration of this state of affairs strongly suggests that the amendment of 1884 was intended to remedy it, by providing for the recognition of this intangible class of assets—namely, paying membership. But to assume that the legislature intended to dispense with all requirement for any other kind of assets, would involve the proposition that it intended to permit foreign insurance companies to do business in this State under regulations which would subject the citizen who might insure in them to the risk of having his claim for a loss cut down by whatever amount of deficit there might happen to be on account of the failure of members to respond to their assessments, without any convenient or certain remedy. Such a conclusion would be entirely at variance with the policy of the legislature as shown by the various successive enactments upon this subject, all of which have plainly had in view the more complete protection of the rights of citizens insuring in non-resident companies; and so far from requiring it, the language and grammatical construction of the section, as amended, are clearly against it.

The provisions of the amendment are plainly alternative only with the clause immediately preceding, and do not refer back to that which requires assets amounting to \$100,000. The section as amended, permits the granting of a license to a mutual co-operative company having assets of at least \$100,000, and which shows whatever amount in addition thereto may be necessary to balance its liabilities as ascertained in the manner prescribed, or a compliance with the conditions prescribed in the amendment.

The petition is dismissed without costs.

SUPREME COURT OF PENNSYLVANIA.

*Appeal from Decree of Common Pleas of the County of Centre, in
Equity.*

LEBANON MUTUAL INS. CO.)

vs.

ERB.* }

Where a defendant in an execution has had a trial, and has failed to make a defense which he might have made under the pleadings in the cause, he cannot after judgment duly entered, seek relief by an injunction staying the collection thereof, unless prevented from making the defense on the trial by the action of the plaintiff.

Ignorance of the defendant will afford no relief, if that ignorance resulted from neglect in not taking proper steps to obtain information.

ADAM HOY, *for Appellants.*

HASTINGS & REEDER and JOHN H. ORVIS, *for Appellees.*

This is an appeal by the Lebanon Mutual Insurance Company from the order and decree of the court of common pleas of Centre County, dissolving and setting aside a preliminary injunction.

In the early part of May, 1882, John Erb applied to an insurance firm at Phillipsburg, Pa., for a policy of insurance upon a tannery building, engine, boiler, and machinery at Port Matilda. A member of this firm visited the property and made a personal examination and survey of the same, after which the agent filled out an application for \$1,000 insurance, which John Erb signed. In due time the policy in question was delivered to John Erb.

* From *Eastern Reporter*.

On the night of August 10, 1882, the premises insured were totally destroyed by fire. On August 13, 1882, notice was sent to the company of the loss. No answer was returned to this notice until the 24th of August, when the company informed Erb that they denied all liability, for the reason that the company had never received the premium. On September 6th, formal proofs of loss were made out and sent by mail to the company, which proofs were duly received. To this and subsequent communications the company returned the same general reply, that they would not recognize the claim.

October 18, 1882, Erb sued the company and recovered a judgment of \$1,090, on February 20, 1884.

On March 4, 1884, a writ of error to the supreme court was filed. On February 16, 1885, a judgment of non pros. was entered in said writ of error, because the recognizance did not contain a condition for the return to the court below of the record with the remittitur, as provided by the act of Assembly of 8th June, 1881. On 17th February, 1885, a remittitur, with the record from the supreme court, was filed in the court of common pleas of Centre County, and on the same day, a writ of testatum fieri facias was issued on said judgment, directed to the sheriff of Lebanon County.

On the 16th April, 1885, a bill in equity was filed in the common pleas of Centre County, against John Erb et al., alleging in substance, that the defendant John Erb set fire to and burned the insured property for the purpose of obtaining the insurance, and that this alleged fact was not known to the company until more than a year after the trial of the cause. An injunction was asked to restrain the sheriff from executing the testatum fi. fa., with a prayer to open judgment, and grant a new trial and further relief. On the 16th of April, 1885, a special injunction was granted. On May 8, 1885, the answers of John Erb and Elizabeth J. Erb, denying every material allegation of the bill, were filed, and on the same day the motion to continue the injunction was argued. On May 11, 1885, the preliminary injunction was dissolved and set aside, the common pleas delivering the following opinion :—

“As appears from the contents of complainant's bill, John Erb on the 18th day of October, 1882, instituted an action of covenant on a policy of insurance issued by the complainant in this bill to the said John Erb. Due and legal service was made upon the Lebanon Mutual Insurance Company, and it, by counsel regularly employed for that purpose, entered of record an appearance and plea in said suit.

The suit thus begun came on for trial on the 7th of February, 1884, before Krebs, P. J., of the forty-sixth district, in special court, and was tried before a jury, and a verdict rendered in favor of the plaintiff, John Erb, in the sum of \$1,090, and subsequently a writ of error taken to the supreme court on the 16th of February, 1885, was non prossed and the record remitted, and testatum fieri facias issued to Lebanon County, Pa., to Frank B. Boeshore, high sheriff, commanding him to execute the same. The grounds of this application for an injunction are that the defendant John Erb set fire to and burnt the building insured with intent to defraud the insurance company, and that at the time of the trial they had no knowledge of this alleged fact; and, secondly, that he testified falsely as to the ownership of the property insured at the time of the trial, and that by reason of these two alleged acts on his part he committed a fraud upon the complainant, and that it is against conscience to permit the plaintiff in that judgment to collect the same, for these reasons. There is no hard, unbending rule which limits the equitable power of the court to interfere with and stay by injunction the collection of a judgment. But whether or not the court shall do so, depends upon the clear and undoubted proof of facts, which would render the collection of a judgment unconscionable and inequitable, and the additional reason that the defendant in the judgment has had no opportunity to show the same, or in other words, has not had "a day in court." Where a defendant in an execution has had a trial, and has failed to make a defense which he might have made under the pleadings in the cause, he cannot after judgment duly entered seek relief by an injunction staying the collection thereof, unless it clearly appears that he was prevented by the action of the plaintiff in the judgment from making the defense, which would have produced a different result if it had been made at the trial, or at least ought to have produced a different result. The ignorance of the defendant will afford no relief, if that ignorance resulted from neglect in not taking proper steps to obtain information. The true rule, we believe, is that a judgment will not be restrained by injunction, where steps have been omitted, which ought to have been taken, or where ignorance is mixed up with negligence. In support of this rule we refer to *Cheney vs. Wright*, 7 Phila., 431; *Hetzell vs. Bentz*, 8 Phila., 261; *Wistar vs. McManes*, 54 Penn. St., 318. A judgment will not be enjoined, however plainly it may appear that the complainant had a good legal defense, which was not presented or considered through the oversight of counsel, or the error of the judge, or from

failure on part of the defendant to collect the evidence in due season and present it in a way to be available: *Duckworth vs. Duckworth*, 35 Ala., 70; *Becker vs. Elkins*, 1 Johns., 466; *Marine Ins. Co. vs. Hodgson*, 7 Cranch, 332; *Windwart vs. Allen*, 13 Md., 196; *Katz vs. Moore*, id., 566; *Hendrickson vs. Hinckley*, 17 How., 445.

Tried by these well-established rules, how does the complainant's application stand? The separate answers filed by the defendants flatly contradict all the material averments of the complainant's bill and the evidence by the ex parte affidavits offered in support of the complainant's bill can at most raise a suspicion that the plaintiff in the judgment set fire to the building to defraud the complainant company. We could not consider the question of the ownership of the property, because that was fully tried by and before the jury, and it is "res adjudicata," and if we were to establish a precedent by interfering with and enjoining the collection of this judgment upon grounds of suspicion only, we would open the very floodgates of perjury.

We are unable to find sufficient evidence in the affidavits submitted which would justify us in granting a new trial were there an application of that nature upon motion made after verdict and before judgment entered, and if we would not be justified in granting a new trial we surely are not justified in continuing the preliminary injunction.

PER CURIAM : We see nothing in this record to convict the court of error in dissolving the preliminary injunction, nor in refusing to open the judgment.

Decree affirmed, and appeal dismissed at the cost of the appellants.

UNITED STATES CIRCUIT COURT

FOR THE DISTRICT OF KENTUCKY.

SUPREME LODGE KNIGHTS OF HONOR

vs.

REBECCA M. MORGAN.*

A certificate issued by a beneficial society, payable to the wife of a member by name cannot, be willed by him to another woman who might have supposed herself to be his wife.

Whether a payment made by officers of a subordinate lodge was a payment by such lodge or by the grand lodge in another State, held to be a question of fact to determine from the evidence as to whether such subordinate lodge had thus accepted its charter from the grand lodge.

The jurisdiction of a United States court must depend upon which body was liable and made the payment.

JOHN MILBURN, *for Plaintiff.*

Messrs. AYERS & GIVENS, *for Defendant.*

Charge by BARR, J.

In this case that you have heard the past few days, of the Supreme Lodge Knights of Honor against Rebecca M. Morgan, I have concluded to ask you to find a general verdict, and also to answer certain questions.

The plaintiff in this case, the Supreme Lodge Knights of Honor, acting under and in virtue of an incorporation by the State of Missouri, sues the defendant to recover \$2,000, which they say was paid to her on a mistaken idea, upon false representations or untrue representations that the defendant was the widow of Mr. Morgan and entitled to the benefit, the \$2,000 benefit which Louisville

* Charge delivered, March 20, 1886.

Lodge No. 2 of the Knights of Honor of this city were liable for to Robert Morgan.

The question arises first, whether or not the Missouri corporation, that is to say, the Supreme Lodge of the Knights of Honor organized in Missouri, paid this money or whether it was paid under the authority, and by the Knights of Honor acting under the charter of the Kentucky corporation. If it was under the Kentucky corporation, then this court has no jurisdiction of the matter, and the plaintiff in this action cannot recover. The claim of the plaintiff is, that they paid the defendant wrongfully without her having legal right to \$2,000, and they seek to recover it. The question of who was liable to Morgan under the certificate, or who is now liable, if there be a liability, to Louise J. Morgan, is a question not before you in this case. The question of fact is, whether the defendant Rebecca M. Morgan was entitled to receive the money from the Missouri corporation. If she was not, then if the Missouri corporation paid her, and if it did pay her wrongfully, that is to say, without her having a legal right, then the plaintiff is entitled to recover.

You remember the facts are presented, and there is no conflict of evidence as to the fact that there was in 1881, a benefit certificate issued, and that certificate is presented, and it is payable at the death of Morgan to Louisa J. Morgan, whose deposition was read to you. Now, as a matter of law I instruct you that though the defendant may have been married without any fault of hers, without knowledge that the wife of Morgan was living, and though there may have been also a will which has been exhibited to you, which is competent evidence in one sense, that is, competent evidence to show an effort on the part of Morgan to will this certificate and this benefit away; still, as a matter of law, he had no right to will it away. He may have had some right of indication indeed, of changing the direction of the benefit, but there is nothing here to show that he exercised that right according to the laws of the order or according to law. The certificate itself having been issued to Louise J. Morgan, payable to her at the death of Robert Morgan, she is entitled to it as the facts stand before you now, and therefore, Rebecca M. Morgan the present defendant had no right to receive \$2,000 in discharge of this benefit.

Now, the question arises for your consideration, who paid the \$2,000. There is no contrariety of evidence as to the officers who paid it, or the manner of payment. The question arises as to the

Supreme Lodge of the Knights of Honor who paid it, whether at the time of payment in July, 1885, they acted under the authority of the Missouri corporation, or of the Kentucky corporation. If they acted under the authority of the Kentucky corporation, why then the plaintiff is not entitled to a verdict in this court and in this case, because the defendant and the Kentucky corporation are citizens of the same State, and therefore this court has no jurisdiction. The act of incorporation is regular according to the Missouri law which was exhibited to you, and the question of fact remains for you to ascertain whether or not the Supreme Lodge of the Knights of Honor in July, 1885, and in this payment, acted under the Missouri incorporation or the Kentucky incorporation, and upon that question of fact turns your verdict.

To bring the matter more definitely to your mind, of course if you find for the defendant, you will say that we of the jury find for the defendant simply. If you find for the plaintiff, you will say that we of the jury find for the plaintiff in the sum of \$2,000, and you may give interest from the time of the filing of this suit if you desire, or you may not. That was August 6th, 1885. I ask the jury these four questions which will get them to answer so that we will know exactly their view of the matter.

1. What amount of money, if any, was paid the defendant Rebecca M. Morgan by the Supreme Lodge Knights of Honor, and if paid when was it paid?

In regard to that, there is no contrariety of evidence. Perhaps counsel might agree upon an answer to that question. I thought it was best to ask the jury the amount.

2. Was or not said defendant Rebecca M. Morgan legally entitled to the money thus paid, by the Supreme Lodge Knights of Honor?

You have heard what I have said upon that subject.

3. Had or not the Supreme Lodge Knights of Honor accepted the charter granted under the laws of the State of Missouri prior to the payment of the money in July, 1885, to the defendant?

You remember the evidence upon that subject, and there was a charter exhibited before you dated in 1884, June, 1884. Now the question is, whether the Supreme Lodge Knights of Honor had accepted prior to July, 1885?

4. Were the officers or officer who made the payment to defendant Rebecca M. Morgan acting in making said payment under a charter of the Supreme Lodge Knights of Honor granted by the State of Kentucky, or under a charter granted by the State of Kentucky, or under a charter granted under the laws of the State of Missouri?

You heard the evidence in that respect. You have heard the statements of the officers who made the payment, how they made it and all about it. You have heard the various statements, and it is for you to say whether in making this payment those officers acted under and in virtue of the charter granted by the State of Kentucky, or by virtue of the charter granted by the State of Missouri. You will find a general verdict either for the plaintiff or the defendant, and will answer these questions.

The jury rendered a verdict in favor of the plaintiff, and answered the special questions in favor of the plaintiff as a Missouri corporation.

NOTE.—This decision was final, the case not being appealable.

SUPREME COURT OF IOWA.

Appeal from Clinton District Court.

HATTIE A. DAVIS, *Appellee*,

vs.

IOWA STATE INS. CO.*)

By absolute interest in an insurance policy is meant an estate in fee simple, not a life estate.

The property was conveyed to the insured as a life estate, and at her death to vest in her children, but in the absence of children was to revert to the grantor.

Held, That the interest of the insured was not absolute, and where the policy provided that in such case it should be forfeited, there could be no recovery.

CRAIG, COLLIER & CRAIG and E. S. BAILY, *for Appellant*.

GEORGE B. YOUNG and A. HOWAT, *for Appellee*.

BECK, C. J.

1. The policy contained a clause providing that certain conditions printed upon the back of it constituted a part thereof. One of these conditions is in the following language: "If the interest of the property to be insured be a leasehold interest, or other interest not absolute, it must be so stated in the policy, otherwise the same shall be void." The policy also referred to the application of the assured as forming a part thereof. In this application she stated that no person, other than herself, was interested in the property.

The plaintiff's title is based upon a deed of which the following

* Opinion filed, December 11, 1886.

are the material points: "This deed of bargain and sale, made and executed the twenty-first day of November, A. D. 1881, by and between Raphael Rinehammer and Julia A. Rinehammer, his wife, of the county of Clinton and State of Iowa, parties of the first part, and Hattie A. Davis, of the same place, as party of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of eight thousand dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted and sold, and do by these presents grant, bargain, sell, convey, and confirm unto the said party the real estate situated in the county of Clinton and State of Iowa, and known and described as follows, to-wit [here follows description of property]; the intention being to convey to Hattie A. Davis a life estate in said real estate, and at her death to then vest the title in her children, that is to say, the children of her body,—and if there should none survive her, then the said real estate shall revert to the said R. Rinehammer, or to whomsoever he may convey, or direct the same to be conveyed, to have and to hold the aforegranted premises, with all the appurtenances there belonging unto the said second party. The said R. Rinehammer hereby covenanting for himself, his heirs, executors, and administrators that the aforegranted premises are free from any incumbrance, except a mortgage to the Perpetual Building Association, of Clinton, Iowa, which said grantee assumes and agrees to pay; that he has full right, power, and authority to sell the same, and he will warrant and defend the title unto the second party against the claim of all persons whomsoever lawfully claiming the same; and the said Julia A. Rinehammer hereby releases and relinquishes all her share of, and right of dower in and to, the above-granted and described premises."

2. It becomes a material question for our determination whether plaintiff held an "absolute interest" in the property insured. By the term "absolute interest" we understand a complete and perfect interest, not an estate for years or for life,—an estate in fee simple,—is meant. Counsel for the respective parties seem to concur in this view.

But plaintiff's counsel insist that the deed to plaintiff does not convey such a title; the clause thereof declaring the intention of the grantor, being not of the habendum part of the deed, nor of the description of the estate conveyed. But it is in fact found in what is called the "premises" of the deed, which contains a description

of the property conveyed and the estate granted. The clause of the deed describing the estate granted in unmistakable language declares that the intention of the grantor was to convey a life estate. That clause is, in fact, a description of the interest granted, and limits it to an estate for life. The deed is not a conveyance of an estate in fee simple, with a limitation inconsistent with the grant, as is the case with the deed in *Case vs. Dwira*, 60 Iowa, 442; s. c. 15 N. W. Rep., 265. It is a conveyance of a life estate, and nothing more. We are unable to see how the description of the interest conveyed could be more plainly expressed than is done in this deed. We discover nothing in the cases cited by plaintiff's counsel in conflict with this conclusion. *Green Bay Co. vs. Hewett* (55 Wis., 96; s. c. 12 N. W. Rep., 382) is relied upon by plaintiff's counsel to support his conclusions. In that case there was a conflicting description of the property conveyed, not of the estate granted. The deed, being a quitclaim, purports to convey all the grantor's interest in certain land. Another subsequent clause further declares that the interest intended to be conveyed was the same the grantor had acquired under a sheriff's deed. He held an undivided half of the land under that deed, and the other half from a different source. We need not determine whether the decision of the case is in accord with principles of the law. It is distinguished from this case by its facts.

3. The plaintiff holding not the absolute interest,—the fee-simple title,—but a life estate, the condition of the policy declaring that if her interest was not disclosed the policy shall be void is broken, and by the terms of the policy no recovery can be had. No waiver of this breach is claimed.

4. Much is said in argument upon the question whether the declaration of plaintiff in her application as to her interest in the property operates as a warranty. We need not pursue this subject, as we find a breach of an express condition of the policy which defeats recovery. In our opinion, the district court erred in holding that plaintiff was entitled to recover upon the undisputed facts of the case relating to the estate of plaintiff and the condition of the policy. Reversed.

SUPREME COURT OF IOWA.

C. H. STENNETT, *Appellant*,

vs.

PENNSYLVANIA FIRE INS. CO.*)

The mere fact that a witness is an agent does not qualify him to testify as an expert concerning increase of risk. He must be experienced through his duties in passing upon risks.

Knowledge acquired by the agent concerning the nature of the title, and that foreclosure proceedings were pending six months previous, cannot be alleged as knowledge of the condition of the ownership when acting as agent in issuing the policy.

R. W. BARGER and JUNKIN & DEEMER, *for Appellant*.C. E. RICHARDS and S. MCPHERSON, *for Appellee*.

ADAMS, C., J.

1. The property was insured January 8, 1884, as a saloon for the sale of wine and beer. After the law took effect prohibiting the sale of wine and beer the use of the building as a saloon was discontinued, but the occupant proceeded to use it as a gambling-house. The policy provided against any change of use which should increase the risk. The defendant averred in its answer the change of use as an increase of risk, and offered to show by one Henry, as an insurance agent, that, in his opinion, the use in question involved an increase of risk. The court, however, excluded the evidence upon the ground that the subject was not one upon which expert testimony was admissible. The ruling is assigned as error.

As to whether expert testimony upon such a subject is admissi-

* Decision rendered, April 23, 1886.

ble there appears to be some conflict in the authorities. In *Mitchell vs. Home Ins. Co.*, 32 Iowa, 424, it was held, without any special consideration of the authorities, that it was admissible, though the exclusion of it under the facts of that case did not amount to reversible error. We do not find it necessary to give the question much attention, because the ruling can be sustained upon the ground that the witness utterly failed to show that he was qualified to testify as an expert. It is abundantly evident that a person does not become thus qualified by the mere fact that he is an insurance agent. He should be one whose duties had been such that he had become experienced in passing upon risks, or had acquired special knowledge upon the subject. A mere soliciting agent, as the witness in this case might have been, is not necessarily of that class. In *Fland. Ins.*, 523, the author says: "Insurance officers or agents cannot be called as experts in matters of this kind unless it appears that, in the course of their business, they have acquired special knowledge of the subject-matter of the inquiry."

2. The policy contained a provision in these words: "If insurance is desired on property of any kind in which the interest of the applicant for insurance does not amount to the entire, sole, and absolute ownership, it must, in every such case, be so represented to the company, and clearly expressed in the body of the policy; otherwise there will be no liability hereunder as to such property or limited interest." The policy also contained a further provision in these words: "Agents of this company have no power to bind the company in violation of any of the printed terms or conditions of insurance as herein expressed, and no printed or written condition or restriction hereof, which by its terms may be the subject of waiver, shall be deemed to have been waived except by a distinct, specific agreement, clearly expressed in the body of the policy." The plaintiff showed in his petition that his interest in the property at the time he applied for and obtained the insurance was merely that of the holder of a sheriff's certificate, issued upon a sale made upon execution, and the character of his interest was not expressed in the body of the policy. The plaintiff, however, to avoid the effect of the provision of the policy, pleaded that he did not examine the policy when it was delivered to him; that he notified the agent of the character of his interest, and supposed that it was properly expressed in the body of the policy. On the trial the plaintiff, for the purpose of proving that the defendant's agent had notice of the character of the plaintiff's interest in the property,

offered to prove that the agent was a notary public; that as such, about six months before the issuing of the policy, certain depositions were taken before him to be used in the foreclosure action in pursuance of which the execution sale was made at which the plaintiff purchased. The defendant objected to the evidence, but the court admitted it.

In this we think that the court erred. Whether, under the provisions of the policy, it was competent to show by parol that the real contract between the parties was different from that expressed in writing, or that provisions of the within contract were waived by a parol understanding at the time it was executed, it is not strictly necessary to determine, and we might not be agreed. It is sufficient to say that we do not think that the evidence would have had any tendency to prove the understanding relied upon. The fact that the defendant's agent acted as a notary public in taking depositions in the foreclosure action would have shown, perhaps, that he had knowledge at that time of the pendency of that action, but it would not have shown that he knew at the time the policy was issued that a decree had been rendered, and that the plaintiff had purchased the property at execution sale, and that it remained subject to redemption. Absolute ownership might have accrued to the plaintiff before the issuance of the policy, notwithstanding the fact that he was foreclosing a mortgage upon the property a few months before. Besides, the knowledge acquired by the notary was not acquired by him as agent of the company, nor while acting as such, but merely incidentally, while transacting other business, and not sufficiently near to the time of the issuance of the policy to justify any inference that he had it in mind, and acted upon it, in issuing the policy.

For error in the admission of this evidence, the judgment must be reversed.

UNITED STATES CIRCUIT COURT OF VERMONT.

FITTON AND WIFE

VR.

PHOENIX ASSURANCE CO. AND OTHERS.*

The agents of the four companies signed an agreement addressed to the insured as follows: "We hereby agree to bind from date twelve thousand dollars of insurance on woolen mill, * * in the North British and Mercantile, Commercial Union, Guardian, and Phoenix of London Insurance Companies at 3 per cent." The companies had no business relations with each other, nor had the agents authority to act except each for his own company.

Held, That the insured could not also claim a policy which had been prepared in a fifth company for a portion of the loss by the agents, but had not been delivered.

Held, That the risk was to be equally divided between the companies, and each was liable under a separate policy for one-fourth of the amount.

Held, That the right to receive payment accrued upon the refusal of the companies to issue policies or accept proofs.

MARTIN H. GODDARD, *for Plaintiffs*.

W. S. B. HOPKINS and MARTIN & EDDY, *for Defendants*.

WHEELER, J.

The issues of fact, which were sent to a jury in this case (23 Fed. Rep.) have been tried, and by verdict, found for the plaintiffs. A question was raised as to the value of the property destroyed by fire. This question was, by agreement, referred to a master, who has reported the value to have been \$14,333. No exceptions have been filed to that report. The sum for which insurance was agreed was \$12,000. Therefore there is no question but that there should be a

* Decision rendered, December 29, 1885.

decree for the full amount agreed for. The only remaining question is whether there shall be a decree against all the companies for the whole, or against each for its proportion. This question was left open when the demurrer of these defendants was overruled: 20 Fed. Rep., 766. This is not an agreement of insurance as such agreements are set forth and expressed in policies of insurance duly executed by the insurers, but is an agreement for insurance signed by agents of the respective companies, as such agents, to be so set forth in a policy or policies to be thereafter executed. One ground of the jurisdiction of the court as a court of equity is that there might be a decree for specific performance of the agreement by actual execution and delivery of the policies according to the terms of the agreement. Then full relief would be given, as is usual in equity cases, by further decree for the payment of the loss according to the terms of the policies: *Taylor vs. Merchants' Ins. Co.*, 9 How., 390; *Wood, Ins.* 29, 32. In form, the decree for the execution and delivery of the policies is frequently omitted, and a decree for the payment of the loss only is made, where there has been a loss; but the grounds for the decree remain the same. So the real question here now is as to what policies would be required to carry out the agreement made by the agents with the plaintiffs; whether there should be one policy for the whole amount, duly executed and delivered by all the companies jointly, or a separate policy executed and delivered by each for its share of the risk. The terms of the agreement are in the writing, but these terms are to be applied, as those of all written agreements are, to the subjects to which they relate. The writing is:—

"To Mrs. Helen M. Fitton—DEAR MADAM: We hereby agree to bind, from date, twelve thousand dollars of insurance on woolen mill and machinery, at Cambridgeport, as per survey on file at our office, in the North British & Mercantile, Commercial Union, Guardian, and Phoenix of London Insurance Companies, at three per cent."

The companies are not shown to have, nor understood to have, any business relations with each other further than that each insures property against loss by fire. The agents who signed the writing are not shown nor understood to be agents of the companies jointly, to act for all; but are understood to be the agents of each, to act for it, in effecting insurance. Their acts should be construed in accordance with their authority. The words "of" and "in" are understood to be used as distributives of the \$12,000. They agreed to bind that

sum, in all, among the companies. Separate policies for one-fifth of the risk each, in each of these four and in another company, were written by the agents upon the blanks of the respective companies furnished to the agents, before the agents knew of the loss. The plaintiffs demanded these policies, which were refused. The plaintiffs were not entitled to the policy of the other company, because it had never been contracted for. Hence, the demurrer to the plaintiffs' bill by that company was sustained: 20 Fed. Rep., 766. This construction of the written agreement by the parties excludes any understanding that there was to be a joint policy for the whole. The whole case goes to show that the understanding was that separate policies to the amount of \$12,000 in all, in the respective companies, were to be made out and delivered by the agents. They had no blank policies executed by all the companies jointly, and would doubtless have been as much surprised if the plaintiffs had requested, as the companies would if the agents had asked of them, such policies.

The effect of the decision of this question upon the right to appeal has been urged, but that has no present bearing. It is the duty of this court to make such decree upon the case as made as appears to be lawful and just. Whether any appeal lies from such decree, when made, is to be determined by the law applicable to that subject.

The risk was to be divided among the defendant companies. The presumption is that it was to be divided equally, as nothing to the contrary is shown. The defendants appear to have denied the plaintiffs' rights to policies, and to payment of loss, August 29, 1883, and did not permit them to make proof of loss under the policies, if such were required. The plaintiffs' rights appear to have accrued upon that refusal, and interest is to be computed from that time.

Let a decree for the orators be entered for the payment, by the defendants each, respectively, to the oratrix of \$3,000, with interest, and one-fourth of the costs of suit, within thirty days from the entry of the decree.

SUPREME COURT OF CALIFORNIA.

COMMERCIAL ASSURANCE CO.)

vs.

AMERICAN CENTRAL INS. CO.*)

The plaintiff was an original insurer, and the defendant its reinsurer, against a certain risk by fire; upon the destruction of the insured property the two companies determined that no liability to pay the loss attached, and agreed that the action brought to recover the loss should be defended. For that purpose the original insurer was authorized to act as agent of the reinsurer in making its defense. *Held*, that in the exercise of its authority it was bound to defend the action until the question of liability was determined; and that it could not compromise and settle the claim so as to bind the reinsurer, unless the latter had knowledge of the compromise, and consented to or approved of it.

Where one is bound to protect another from liability, he is bound by the result of a litigation to which such other was a party; provided he had notice of the litigation, and opportunity to control and manage it, and the same was conducted in a reasonable manner, and without fraud or collusion.

Appeal from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

CHICKERING & THOMAS, and McALLISTER & BERGIN, for the Appellant.
T. C. VAN NESS, for the Respondent.

McKEE, J.

Appeal from a judgment of nonsuit in an action upon a policy of insurance.

From the record on appeal it appears that the Commercial Assurance Company issued a policy of fire insurance to W. B. Bartlett for the benefit of Alexander Forbes, doing business under the name of

* Opinion filed, January 28, 1886.—From *West Coast Reporter*.

Forbes & Brothers, upon a building known as the Eureka Odd Fellows' Association Building in Eureka, State of Nevada, and afterward, on the same day, insured itself in the American Central Insurance Company against the risk which it had taken.

After some months the insured building was destroyed by fire. The person entitled to the benefit of the insurance gave notice of the loss to his insurer, who notified the reinsurer, and the two companies upon consultation came to the conclusion that the claim presented for loss was illegal and unjust, and refused to pay. Forbes Brothers thereupon brought an action against the original insurer to recover the loss, of which the reinsurer was notified; and the two companies again agreed that the action should be resisted and contested, and that the original insurer, as defendant in the action, should have the conduct, management, and control of the contest for itself and as agent of the reinsuring company.

Pursuant to that agreement the defendant in the action filed an answer, and made some preparations for trial, but never brought the case on trial. On the contrary, pending the action, it abandoned the defense of it, compromised and settled the claim with the plaintiff, had the action dismissed, and then brought the action in hand to recover from the reinsurer its pro-rata proportion of the moneys paid and the costs and expenses incurred in the original action.

The policy of reinsurance was a contract of indemnity to the original insurer against liability for the risk it had taken: Civ. Code, sec. 2,646; and when the loss occurred by the destruction of the insured property, it became a question whether the insurers were liable to pay the claim which was presented for the loss. Both the original and reinsurer determined that no liability to pay attached; and agreed that the action brought to recover the loss should be defended. For that purpose the original insurer was authorized to act as agent of the reinsurer in making its defense; and it was bound, in the exercise of its authority, to defend the action until the question of liability was adjudicated: Civ. Code, subd. 4, sec. 2,778. Any judgment rendered against it in the action would have conclusively established its liability, and also the liability of the reinsurer upon its policy, for it is a well-settled rule that, where one is bound to protect another from liability, he is bound by the result of a litigation to which such other was a party, provided he had notice of the litigation and opportunity to control and manage it; the rule being subject to the qualification that the litigation must have been carried on without fraud or collusion, and conducted in a reasonable man-

ner: *Le Blanch vs. Wilson*, 8 Com. Pl. Rep., 227; *Globe Ins. Co. vs. Globe Mut. Ins. Co.*, 35 Pa. St., 479; *Robbins vs. City of Chicago*, 4 Wall., 657.

But the original insurer did not defend the action, and there was no adjudication of the question of liability. In its control and management of the action it acknowledged its liability by abandoning all defenses to it, and compromised and settled with the party it had insured. This it had a right to do, so far as the question of its own liability was concerned; and as there was no privity of contract between the original insured and the reinsured, the latter could not legally object to or prevent such a compromise: *Civ. Code*, sec. 2,649. But the original insurer had no power, under the authority conferred upon it to defend the action for the reinsurer and itself, to compromise and settle the claim so as to bind the reinsurer, unless the latter had knowledge of the compromise and consented to it or approved of it: *Preston vs. Hill*, 50 Cal., 43.

In that particular the plaintiff failed to make out a case. The fact is admitted by the pleadings that the compromise, settlement, and payment of the original claim were made on the twelfth of September, 1881, and the evidence offered by the plaintiff showed that the reinsurer had no knowledge of the compromise, settlement, and payment until several days after they were made, when it heard of them by a verbal notice given to its chief clerk by one of the clerks of the plaintiff's; and upon that informal notice it objected and protested against the compromise.

The plaintiff failed to make out a case, and the court properly granted a nonsuit.

Judgment and order affirmed.

Ross and McKinstry, JJ., concurred.

UNITED STATES CIRCUIT COURT.

DISTRICT OF MINNESOTA.

MAY

vs.

WESTERN ASSURANCE CO. }

The insured applied to A., an agent who had previously been carrying his assurance, for insurance. A., who knew the condition of the property, being unwilling to carry the whole amount, procured a part from S., the general agent of another company, and sent the policy countersigned by S. as agent to the insured. The latter had no knowledge of these facts.

Held, That A. was not the broker or agent of the insured, and his failure to notify S. of the condition of the risk was not chargeable to the insured.

Held, That the indorsement of S. was not sufficient notification to the insured that A. was not the agent of the company issuing the policy.

WILSON & LAWRENCE, *for Plaintiff.*

COLE & BRAMHALL, *for Defendant.*

BREWER, J.

In this case it appears that the plaintiff, Mr. May, went to Judge Ames, an insurance agent in Minneapolis, who had been carrying his insurance for a series of years, and told him that he wanted \$20,000 of insurance. Judge Ames knew the condition of the property, and he afterwards handed in to the plaintiff \$20,000 of insurance; but Judge Ames, it seems, was unwilling to carry that amount in the company or companies that he represented, and therefore went to the agent of the defendant, Mr. Seeley, and offered him \$2,500 of it, and Mr. Seeley took the insurance, wrote out the policy,

and sent it to Judge Ames' office, and Judge Ames thereupon delivered it to the plaintiff. Mr. Seeley, as the agent of the defendant, did not know the condition of the risk, and he had no communication with the plaintiff. The question was whether Judge Ames was the agent of the plaintiff to solicit the insurance, and whether Mr. Seeley, as agent of the defendant, should have been informed by him of the condition of the risk, or whether the defendant company was bound by the knowledge that Judge Ames had,—whether his knowledge of the condition of the risk, under the circumstances, was the same as the knowledge of the agent, and binding upon the company.

It seems to me, from whichever standpoint you approach this case, that it would not be fair to release the defendant company from liability. The plaintiff did not go to an insurance broker to employ him to solicit insurance. He never thought of employing an agent to act for him; but he, as principal, wanting to buy insurance, went to a man who was selling insurance, and proposed to buy from him \$20,000 worth of insurance. Judge Ames proposed to sell it to him, and they each stood in the relation of principal in that negotiation. There is no pretense that when the policies were delivered to the plaintiff any actual notice was given him that Mr. Seeley alone was the agent of the defendant, and the fact that Seeley's name was written across the back of the policy as agent of the defendant is not sufficient to charge the plaintiff with such knowledge. It seems to me that something more was necessary in order to change the relations the parties expressly assumed towards each other than the implication which would arise from the fact that another party's name was written on the policy as agent.

Now, approaching it from the standpoint of the defendant company. They put Mr. Seeley there as their general agent. If he sends out a man to make an examination of a risk, and accepts the representations made to him by such sub-agent, the company is bound by it. It is not to be expected that a general agent, located in a city like Minneapolis, can personally go and examine all the risks offered him. The business must, of necessity, be done through sub-agents principally; and the testimony is that the custom was for agents to go to other agents, and divide insurance with them, when they had more offered them than they cared to carry themselves. Mr. Seeley testifies that that was his custom. If the agent coming to him took part of the risk for their own companies, he relied on that and wrote out the policies. It seems to me to be a very natural

custom, and if the insurance company is willing to allow its general agent, put in charge there, to determine what means of investigation he will rely upon, and he relies upon the investigations or statements of other agents, the insurance company has no right to complain. Whatever Mr. Seeley does within the reasonable scope of the powers committed to him is binding upon the company. If, instead of making an examination himself, he prefers, or is willing, to take the representations of another insurance agent, the company is bound by that act. The particular case cited by the appellant from 58 Md., does not seem to me, by any means, to touch the points in this case.

I think the ruling made by my Brother Nelson was right.

Motion for new trial overruled.

SUPREME COURT OF PENNSYLVANIA.

Error to the Court of Common Pleas of Delaware County.

UNION INS. CO.)
 us.)
MURPHY.*)

The policy required notice from the insured in case of other insurance, but no particular form of notice was required. The policy was procured by the agent of another company who informed the agent of defendant that he also had a policy in his own company.

Held, That this was sufficient notice of other insurance, the agent acted for the insured in procuring the insurance.

O. B. DICKINSON, Esq., *for Plaintiff in Error.*

W. B. BROOMALL, Esq., *for Defendant in Error.*

GORDON, J.

It is wholly unnecessary for us to dwell at any length on the first assignment, which is designed to convict the court of error in allowing the case to be tried without a replication to the defendant's so-called special plea. An objection of this kind must be made before verdict, and even then, there is under our acts of Assembly no fault in pleading that may not be cured by amendment. But the special plea in this case is quite informal, and contains nothing that could not have been introduced under the general issue. This being so there was no replication necessary, or if any, only the general one, which is of a character so purely technical, and so much a matter of course, that it may be supplied by the

* Decision rendered, March 1, 1886.

prothonotary, and at any time, whether before or after verdict. The important question of this case, and the one running through all the subsequent assignments, is whether the evidence was sufficient to establish the fact that previously to the renewal of the policy now in suit the defendant had sufficient notice of the insurance of the plaintiff's property in the Providence Washington Company. The policy in suit contains a covenant by which the plaintiff bound himself to notify the defendant of any other insurance which had been, or might be, taken on the premises. But as there is no form of notice, or manner of service prescribed therein, it is, we think, clear, as the court below held, that any definite and certain information communicated to the company, whether by Murphy, or some one else for him, would be a sufficient fulfillment of the covenant. Was there then evidence enough of such information or notice to warrant a submission of it to a jury? We think there was. Johnson was the defendant's agent, clothed with full powers to act for it; through his agency this property had been underwritten, and he also held Murphy's policy, so that if proper notice was conveyed to him it would be binding on his principal.

Beeby acted in the double capacity of agent for the Providence Company, and for the plaintiff in procuring the insurance in that company. It was when acting in this capacity that he informed Johnson of his having put a policy of two thousand dollars on the property of Murphy in the company last above mentioned, and we cannot see why, if his evidence to that effect was believed, a notice such as this was not sufficient. There is nothing at all ambiguous about Beeby's testimony: "I asked him," Johnson, "if he had any insurance on the buildings, and he said he had. 'I told him that I also had a two thousand dollars policy on the buildings in the Providence Washington Co.'" From this it would seem to follow that there was but little for even a jury to pass upon except the veracity of the witness. Now we cannot think it a matter of any consequence that Beeby did not put his conversation in the form of a notice from Murphy, for Johnson thereby acquired all the information he could have gained from a formal notice, and he could not avoid cognizance of the patent fact that the Providence Washington Insurance had been taken by Beeby for Murphy.

It is true, the charge of the court may, in some particulars, be regarded as too broad, for it will not do to say that the defendant was obliged to take notice of the previous policy, though its infor-

mation had been acquired from a mere volunteer or stranger. But as there was no such contest in the case; no pretense that notice came through any one but Beeby, the jury could not have been misled by the generality of the learned judge's statements. We are also satisfied that the intention of the court, notwithstanding the apparent unrestricted character of its declarations, was to limit the jury to the notice as expressed in the testimony of the witness last mentioned, for, as we have said, there was no evidence of information otherwise conveyed to the company, and upon this point the learned judge charged as follows: "If, I say, you are satisfied that the witness, Beeby, stated substantially the truth touching the notice received by Mr. Johnson, there is sufficient evidence to warrant you in finding that Mr. Johnson had substantial notice."

Under an instruction so explicit as this we do not think the jury could have been misled into the consideration of something foreign to the issue trying.

The judgment is affirmed.

SUPREME COURT OF PENNSYLVANIA.

— — —
McCARTHY ET AL. APPEAL.

Proceedings were commenced to dissolve a speculative assessment company, and a receiver appointed who brought a bill against the officers to recover moneys alleged to be fraudulently appropriated.

Held, That it is no answer to such bill to allege that the company had dissolved and all its obligations had been canceled by forfeiture of contracts before the commencement of proceedings. The officers have no right to retain moneys fraudulently appropriated.

A. H. DILL and A. W. POTTER, *for Appellant*.

CHARLES HOWER and J. C. McALARNEY, *for Appellee*.

STERRETT, J.

After commencement of proceedings by the attorney-general to dissolve the Mahoney Mutual Assessment Life Association of Selinsgrove, the appellee, Henry S. Boyer, was appointed receiver by the court. In the proper discharge of his duties as such, he filed this bill against appellants, officers and directors of the corporation, to recover certain moneys belonging to it which he alleged they wrongfully appropriated and distributed among themselves. The bill charges *inter alia* that they received divers large sums of money belonging to the association which they fraudulently appropriated to themselves; "that during the existence of the association they fraudulently divided among themselves, money and property of the corporation amounting to \$60,000, which should have been applied to payment of death losses now due and unpaid," etc., and prays for discovery, account, etc.

The decree against them is for the payment of \$18,853.73 and costs. It is scarcely necessary to say that the facts found by the master and approved by the court fully warranted the decree against them for at least the sum above stated.

* Decision rendered, June 3, 1886.

It is admitted by appellants that the association was one of those organizations popularly denominated "graveyard insurance companies, . . . engaged in the business of issuing wagering policies," etc. It is also stated that "its business flourished while the craze lasted, and was destroyed in the general wreck caused by the action of the public authorities." That before the attorney-general commenced proceedings against the company, "its business had closed, every policy issued by the policy had been forfeited for non-payment of dues under the provisions of the charter; every debt of the company by reason of obligations arising from the issuing of policies, or of any character whatever, had been fully paid, and the company to all intents and purposes had dissolved," and that "without necessity, a receiver had been appointed ostensibly to protect creditors." These and other similar allegations of fact are made, as alleged in appellant's argument, "for the purpose of showing the exact result which the affirmance of these proceedings will produce. It can be no other than this, that a court of equity will collect money for distribution among a class of alleged creditors who would not be permitted to recover at law." This is truly a novel argument for the officers and directors of a dissolved corporation, who are clearly shown to have fraudulently misappropriated and distributed among themselves over \$18,000 of its funds, to advance, when called on to make restitution. It is a sufficient answer to all this to say that they have no right to retain the money. When it is collected by the receiver, the court, whose officer he is, will supervise the distribution thereof, and they will doubtless award it to those who are better entitled to receive it than the appellants are to retain it. The question of distribution is not now before us, and what has been said in relation to those who have participated, or are likely to participate, in the distribution, is entirely foreign to this contention.

There was no error in making the decree against appellants jointly. The evidence shows they acted jointly in the fraudulent misappropriation and distribution of the funds among themselves, and if there are any equities, as between themselves, which they are disposed to recognize, they are the proper parties to adjust them.

It is unnecessary to discuss the remaining assignments of error. We discover no merit in either of them.

Decree affirmed and appeal dismissed at the costs of appellants.

SUPREME COURT OF MICHIGAN.

SIMON

vs.

HOME INS. CO. OF NEW YORK.*

The policy was issued to L. Simon, and the interest of the insured, who was a woman, was referred to throughout as "his."

Held, That where the name of the insured was L. Simon, the error in regard to her sex will not defeat recovery if she be shown to be the owner.

Where the fire was admitted not to be wrongful, the refusal to permit the repetition of questions in a slightly different shape which had already been answered, and which could only be material on the assumption of a fraudulent fire, was not error.

DICKINSON, THURBER & HOSMER, *for Plaintiff*.

BLODGETT & PATCHIN and CHEEVER & UNDERWOOD, *for Appellant*.

CAMPBELL, J.

Plaintiff, a married woman, sued for insurance on a stock of goods and household articles burned March 26, 1884. The policy was issued May 28, 1883, for \$1,000. It was issued to L. Simon on an application signed L. Simon, and in some of its provisions uses the word "his" and not the word "her." The plea was the general issue, with special notices of defense which were—First, that the policy was not made to plaintiff, but to some other L. Simon; second, that plaintiff did not own the property; third, that the property was not burned, but removed; fourth, that inflammable articles, forbidden by the policy, were kept; and fifth, that the insurance was obtained not by a woman, but by a man, who claimed to be L. Simon, and to own the property. No affidavit was filed with the plea. The

* Opinion filed, October 28, 1885.

declaration, in accordance with the rules, set out in brief form that the policy was made and issued to plaintiff as described. This, according to rule 79, was admitted by the failure to deny it under oath.

We do not very well see how there was any ground for a claim of fraud, when the premium was not left on credit, and where what are called warranties are practically no more than conditions, and not grounds for an action upon them. But if any such possible wrong can be imagined to arise out of a mistake of names, it is not open to consideration here.

The question of ownership of property was gone into, and, as all the testimony showed plaintiff owned it, there was no room for dispute about the attaching of the policy to it. The question whether the property had been removed was also fairly considered, and the jury found that \$1,400 worth of goods and furniture were destroyed.

So much of the exceptions as relate to rulings on the ownership of the policy and the manner of its procurement, must be regarded as out of the case.

In relating the circumstance of the fire, plaintiff mentioned her going with her children to a neighboring hotel, and their condition of dress. Objection is made that two questions were shut out on cross-examination as immaterial, relating to whether she and her children were not fully dressed. It appears, however, that she had just before, on cross-examination, answered fully as to the same facts, and it was not error to shut out its repetition, merely because in different words. But it was entirely immaterial on the issues. If there had been any plea that the fire was fraudulent and not accidental, the details would be very important, and it would be proper to allow a very searching examination. But when by the plea the honesty of the party is not assailed on that point, and the fire is admitted not to have been wrongful, it could make no difference, as to any issue in the case, whether they escaped at leisure or in haste. And for this reason such answers could not be attacked by way of impeachment, and it was not error to so hold.

The remarks of the judge in his charge appear to have been intended and proper to prevent the jury from being misled by false issues, and, so far as we can perceive, were in no way calculated to infringe on their duties. We see nothing to indicate error in the conduct of the trial or in the charges and rulings, and the judgment must be affirmed.

Morse, C. J., and Champlin, J., concurred.

SUPREME COURT OF MINNESOTA.

PETER GANSER

vs.

FIREMAN'S FUND INS. CO.*

Compliance with the statutes of Minnesota on the part of the company is not essential to the recovery from it on account of a loss.

Where the action was upon a parol contract, and the written contract was not issued until after the loss, it is not necessary to set forth in the complaint the terms of the written policy.

In the absence of any agreement requiring demand for payment to be made, or time to be allowed, a right of action arises at once upon the occurrence of a loss within the contract.

A. C. HICKMAN, for Ganser.

BERRY & MOREY, for Fireman's Fund Ins. Co.

DICKINSON, J.

The points presented by the defendant in support of its demurrer to the complaint are—First, that it is not alleged that the defendant, a foreign corporation, has complied with the requirements of our statute so that it is authorized to do business in this State; second, that neither the terms nor the substance of the policy of insurance are stated in the complaint; and third, that it does not appear that the money sought to be recovered is due or has been demanded.

1. The defendant was not authorized to engage in the business of insurance in this State without having first complied with the statutory requirements; but the right of the plaintiff to recover does not depend upon the fact of the defendant having done so, and the com-

* Opinion filed, December 19, 1885.

plaint is not defective because it does not aver the fact. Even if the defendant had not thus become authorized to make the contract of insurance upon which a recovery is sought, it could not set up its own default of duty to defeat an action by one who had innocently contracted with it: *Swan vs. Watertown F. Ins. Co.*, 96 Pa. St., 37; *Clay F. & M. Ins. Co. vs. Huron Salt, etc., Co.*, 31 Mich., 346; *Germania Ins. Co. vs. Curran*, 8 Kan., 9, 16.

2. The complaint sets forth a parol contract of insurance by the defendant, upon certain described property of the plaintiff, against loss by fire, for the period of one year from the time of making such contract, in consideration of \$50 promised by plaintiff to be paid on demand. It alleges the subsequent executing and delivery of a policy of insurance, according to the terms of the prior agreement, but that before the policy was delivered to the plaintiff the property was destroyed by fire. The action is upon the parol contract. The making of such a contract, and the occurrence of the loss insured against, are alleged. It was not necessary to set forth the terms of the policy, which, since it was not delivered until after the loss had occurred, was not the contract of insurance, so far as can be inferred from the facts stated, although it might be evidence of the contract: *Salisbury vs. Hekla Fire Ins. Co.*, 32 Minn., 458; *s. c.* 21 N. W. Rep., 552.

3. It is averred that the plaintiff gave notice to the defendant of the loss, and made proof of the same, as required by the terms of the agreement, prior to the seventeenth day of September, 1884. This action was not commenced until January following. It does not appear, and it is not to be presumed, that the defendant stipulated for any allowance of time, after the loss should occur, in which to make payment; nor that payment should not be required until demand should be made. When a contract obligation to pay a stated sum of money becomes complete, a right of action to recover it arises at once, in the absence of any agreement making a previous demand necessary: *Leak, Cont.*, 642; *Locklin vs. Moore*, 57 N. Y., 360; *Watson vs. Walker*, 23 N. H., 471. It does not, therefore, appear from the complaint that the action was prematurely commenced. The order overruling the demurrer to the complaint is affirmed.

UNITED STATES CIRCUIT COURT.

DISTRICT OF MASSACHUSETTS.

FRANCIS H. INGLES ET AL.

vs.

NEW ENGLAND MUT. LIFE INS. CO. ET AL.*

Under the Massachusetts statute in the case of a wife's policy where it is claimed that the contract was made in furtherance of a conspiracy between the husband and wife to cheat the creditors of the former, the most that the creditors can recover is an amount equal to the premiums paid with interest, and an injunction will only lie to restrain the payment of the claim as to such amount.

COLT, J.

The plaintiffs in this suit, as creditors of Norman B. Harwood, seek to reach and apply the proceeds of a policy of insurance, issued by the defendant company in favor of Harwood for the benefit of his wife and children, who are also made parties defendant.

The bill alleges that the contract of insurance was made in furtherance of a conspiracy between Harwood and his wife to defraud and cheat the creditors of the former, and that the premiums paid upon the policy were paid out of moneys fraudulently obtained from his creditors.

The present motion raises the question whether, under these circumstances, the court should continue the injunction restraining the insurance company from the payment of the policy to the widow.

The policy contains a provision that the contract shall be governed

and construed by the laws of Massachusetts. Section 167 of chapter 119 of the Public Statutes of Massachusetts provides as follows:—

“A policy of insurance on the life of a person, expressed to be for the benefit of a married woman * * * whether procured by herself, her husband, or any other person * * * shall inure to her separate use and benefit and that of her children, independently of her husband or his creditors, or the person effecting * * * the same or his creditors.” * * * “When a policy is effected by any person on his own life, or on the life of another, expressed to be for the benefit of such other or his representatives, or a third person, the person for whose benefit it was made shall be entitled thereto against the creditors and the representatives of the person effecting the same. If the premium is paid by a person with intent to defraud his creditors, an amount equal to the premium so paid, with interest thereon, shall inure to the benefit of his creditors, subject, however, to the statute of limitations.”

The statute seems to provide specifically for the case before us. Admitting the allegations of the bill to be true, it appears that, upon the policy in suit, the premiums were paid by a person or persons with intent to defraud creditors. Under the statute, therefore, it seems clear that the most the creditors can recover is an amount equal to the premiums so paid, with interest thereon. The injunction may be vacated except as to a sum equal to the amount of the premiums paid and interest thereon.

LOWER COURT DECISION.

MORTGAGE OF PART OF INSURED PROPERTY.

Marion Co. (Ind.) Superior Court.—Appealed from Special Term.

JOHN H. CALVERT

vs.

OHIO FARMERS INS. CO.*

A policy insuring on certain personal property in a barn, including farming implements, wagons, etc., whose provision against alienation or mortgage is violated by mortgaging a certain portion of the property, is not thereby vitiated as respects the portion not mortgaged.

Trial was had in special term, and finding and judgment in favor of plaintiff. The defendant appealed to the general term, wherein the judgment is affirmed, and the following opinion filed by—

Howe, J.

The main question in this case is as to the correctness of the conclusions of law by the special term upon the special finding of facts, as appears by such finding. The defendant insured the plaintiff, John H. Calvert, against loss by fire upon certain personal property, including "farming implements, wagons, carriages, and harness," in certain barn mentioned. The policy also insured one Amanda Calvert against loss by fire upon other personal property, including hay, grain, fodder, and seed," in another barn. The policy contained a general clause making void the policy, "if the property be sold or transferred, or incumbered by mortgage or otherwise, without the written consent." It contained other provisions, making

Opinion filed, April 5, 1886.

void the policy if the assured should without the consent of the company have or make "any other insurance on the property hereby insured, or any part thereof," and also "if said property or any part thereof should be levied upon, etc."

After the issuing of the policy, and without the consent of the defendant, the plaintiff mortgaged a cultivator and a plough included in the property insured, and after that a portion of the property insured, including the plough but not the cultivator, was destroyed by fire.

The special term allowed the plaintiff for the value of all the property destroyed except the plough, which was valued at five dollars. The defendant company appealed.

I think that the judgment of the special term was correct. It is true, however, there is a very considerable conflict between the authorities as to the effect of a general prohibition against alienation or incumbrance in a fire insurance policy, where only a portion of the property insured is subsequently alienated or incumbered. But the strong tendency of the recent decisions is so to construe the policy, if possible, as that it may be enforced as to the property not alienated or incumbered: *May on Insurance* (2d Ed.), 11, 278; *Merrill vs. Agricultural Ins. Co.*, 73 N. Y., 452.

We should probably so construe the clause against alienation or incumbrance in this policy in suit if it stood alone. Now, if we were to hold that a mortgage of a part of the property insured vitiated the policy as to all the property insured, we should be compelled to hold also that an alienation of a part of it had the same effect and, therefore, that Amanda Calvert could not without vitiating the policy as to her, sell a bushel of wheat or a peck of clover seed unless she first obtained consent of the defendant company.

That no such construction of the policy was in the minds of the parties is clear, however, from the other clauses in it making it void in case of the insurance or levy upon the property, or any part thereof. If it had been intended that the alienation or incumbrance of "any part hereof," should vitiate the policy, it is fair to presume that the intentions would have been so expressed in plain words as it was so expressed in regard to levy and other insurance.

Judgment affirmed.

Walker, J., concurring.

THE INSURANCE LAW JOURNAL.

VOL. XV.

AUGUST, 1886.

No. 8

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF VERMONT.

RUTLAND COUNTY.

JANUARY TERM, 1886.

JAMES MULLIN

vs.

VERMONT MUTUAL FIRE INS. CO.* }

Where an application for insurance against loss by fire was obtained by one not an agent of the defendant, but a broker doing the business under an arrangement with defendant's duly authorized agent, by whom it was sent to defendant, and the defendant returned it for additional information as to the ownership and occupation of the property to be insured, and the agent gave the application to the broker with instructions to obtain the answers from the applicant, and the broker took the application away and returned it with the answers written in his own handwriting and not in accordance with the facts, although the broker at the time had full information as to the facts; *Held*, That the act of the broker under these circumstances was the act of the agent, and the knowledge of the broker, no

* Opinion filed, June 26, 1886.

matter when obtained, if before the answers were given, was the knowledge of the defendant, and it was estopped from setting up such false answers in defense.

It was the duty of the assured to supply the defendant with an honest inventory of the property damaged, and although he could properly employ his wife to make the inventory of household goods destroyed, if he makes oath to one thus made by his wife containing false statements and fraudulent claims, without knowing of its false claim and without scrutiny, he thereby adopts and makes the fraud his own and cannot recover.

Assumpsit on an insurance policy. Plea, the general issue. Trial by jury, September term, 1884, Rutland County, Veazey, J., presiding. Verdict for the plaintiff. The clause in the policy relating to adjustment of losses contained the following :—

“If there be any misrepresentation, fraud, or false swearing, the claimant shall forfeit all claim by virtue of his policy.”

The application contained the following :—

“The said applicant hereby covenants and agrees to and with said company that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, and value of the property to be insured, so far as the same are material to the risk; and in case any matter material to the risk is not fully stated, or in any material thing misrepresented, the policy issued hereon shall be void.”

A negative answer was given by the jury to the following questions :

“Was there any fraud, false swearing, or intentional misrepresentation in the proof of loss as presented by the plaintiff?”

“Did Butler in soliciting the insurance, and writing the answers to questions in the application, act in his own behalf, independently of any employment by Manley to aid him in procuring the insurance and preparing and forwarding the application?”

The building in which the property was insured consisted of a barn and two-story building at West Rutland, of which the lower story was occupied as a store, and the upper story by the plaintiff as a tenement, in which he and his wife lived, and Daniel Mullin, mentioned in the policy, was his brother and lived with him as a boarder. The furniture, clothing, etc. was in the upper story.

It appeared that after the application had been made out and forwarded to the company, the company returned it to J. E. Manley, their agent at West Rutland, with the following additional questions : “What kind of goods are kept in this store? by whom owned? are they insured? where? What part of the building are the household furniture, etc.? Are there any other tenants in the building?” The first printed question in the application, namely :

"Where situated, and by whom owned and occupied, and for what purpose?" was answered as follows: "West Rutland; James Gilmore; occupied as store and tenement by James Mullin." In answer to said additional questions, an addition was made to this answer in the words, "and brother, merchandise, drugs and groceries; Mullin Brothers, owners; stock insured in Lycoming Insurance Company."

It appeared that one Michael Carrigan was the owner of the stock of goods in the store and that he was the tenant of the store, and his tenancy was not disclosed by the application. Said Carrigan had previously bought the stock of goods at sheriff's sale, and Mullin Brothers were running the store as clerks for him under an agreement that when they should pay him the amount of the indebtedness upon which the goods were taken and sold, they should become theirs.

The plaintiff gave evidence tending to show that the application was taken by one J. D. Butler, and claimed that said Butler in doing so acted as agent of the company, and the knowledge which he claimed that said Butler had at the time of the application of the false statements and concealments as to the ownership of the goods in the store, the tenancy of the store by Carrigan, and the use of the building for the keeping and sale of intoxicating liquors charged the defendant company with knowledge thereof, and took from it the defenses which it would have had but for such knowledge on the part of said Butler.

J. D. Butler testified that he supposed that he was agent of the defendant.

Mr. Manley, called by the defendant, testified that in January, 1879, he was agent of the defendant company at West Rutland, and that the company had no other agent there; that he knew said Butler, and that Butler was at the time a student at law in his office, and had been there about two years and did some clerical work for him, and solicited insurance as a broker. That Butler was not agent for said company, nor his partner in respect to his (Manley's) agency for said company; that he (Butler) was an insurance broker, and as such engaged in soliciting applications and placing the insurance through agents of insurance companies, and receiving therefor from the agents a commission on each application. That the store of the Mullins was about sixty rods from the office of the said Manley; that said Butler did insurance business by looking up applications and placing them through Mr. Manley in the said defendant company, and through agents for other companies, and got his compen-

sation for insurance placed through Mr. Manley by Mr. Manley's paying him \$1.50 on each application, and that Mr. Manley got his pay from the company by receiving \$2.00 for each application; and in reference to those applications taken by Butler, the said Manley did the correspondence with the company. That Mr. Manley had been appointed agent to the company previous to that time; that he saw the application before it went away from the office to the company, at his office. That said Manley's name was signed to the application by Mr. Butler in Mr. Butler's handwriting, and was made upon one of the blanks of the company furnished to said Manley by the company. Said Manley further testified that said application was shortly afterwards returned to him by the company with said additional questions written on the margin. That upon the receiving back of said application, he handed it to Mr. Butler, and requested him to go and get the reply; and that Butler took the same and shortly after brought it back with the additional answers in Mr. Butler's handwriting; that he knew that said Butler had once worked several days on the Mullin Brothers' books at their store. Said Butler told me about the time the application was made that James Mullin wanted insurance.

As to the time when said Butler learned or knew of the situation of the property, he stated in his deposition, that in December, 1878, he was employed by James Mullin to examine the books of Mullin Brothers, and that at that time he told him of the arrangement between Carrigan and Mullin Brothers in relation to the property insured. The application was approved January 10, 1879. The defendant's evidence tended to show that the time referred to in Butler's deposition, when he was at work on the books, was some three months prior to the time of taking the application. Its evidence also tended to show that the plaintiff was guilty of fraud in his proofs of loss, and of false swearing.

The plaintiff conceded that the numerous articles of silverware which were represented in the proof of loss as lost in the fire, were not lost, but the plaintiff's evidence tended to show that they were inserted in said proof of loss purposely by his wife; plaintiff testified he supposed they were lost, when in fact they were not. It appeared that they were found by officers upon a search warrant on June 11th, 1879, at the house of the plaintiff's father-in-law, where the plaintiff was then living.

At the close of the testimony, the defendant moved the court to direct a verdict assigning that false answers were made in the appli-

cation; (1) as to the kind of goods kept in the store, as to intoxicating liquors; (2) as to the ownership; (3) as to the occupancy; and (4) that there was fraud and false swearing in the proof of loss. The court denied the motion.

The defendant requested the court to charge :—

“There is no proof that Butler knew that Carrigan was tenant or occupant of the store; therefore the claim of knowledge by him as an answer to the concealment in the application of that fact cannot be made.” “That if the plaintiff falsely represented to Mr. Fletcher the adjuster of the defendant company, that the Lycoming Insurance Company had settled and paid the loss under the policy of the latter company upon the store property, claimed to have been lost by the same fire, with the intent thereby to induce a settlement of the loss here in question, that was such misrepresentation as would under the terms of the policy work a forfeiture of all claim on the part of the plaintiff by virtue of the policy.”

“That if the plaintiff in his proof of loss adopted any false statement of his wife with reference to the fact of loss, or the amount or value of property claimed to have been lost, without attempting to know or to investigate the truth of such matter for himself, he thereby became responsible for such statement as misrepresentation within the meaning of the policy, to the extent to which he would have been able by the exercise of reasonable care, to discover the truth in respect to such matters, if he had undertaken to do so.”

“That if the plaintiff in his proof of loss, adopted any false statement of his wife with reference to the fact of loss or the amount or value of property claimed to have been lost, without attempting to know or to investigate the truth of such matters for himself, he thereby became responsible for such statement as misrepresentation, within the meaning of the policy.”

The court charged as to the agency of Butler :—

Manley says in substance that he was a law student in his office; been there about two years; that he got his living by teaching and by clerical work, as he could get jobs, and by soliciting insurance as a broker. He says when he brought an application to him and a policy was issued, he paid him \$1.50 for it. He denies that he had any other relation with him in the insurance business, or that Butler worked for him in it, or had anything to do with his agency for this company. The tenor of his testimony is that Butler acted i

his own behalf in soliciting insurance; and he paid him on each application the same as he would any broker who brought him an application; that Butler was not his clerk or his partner in anything that he did in the matter of insurance. As a law student in his office, he says, in substance, he did some things for him in that connection. This is the substance of his testimony as I recollect it :

It is denied in evidence, and there is nothing to show that Manley had any authority or right to delegate his agency to another. He could not appoint an agent of this company, but he could employ a clerk or partner to help him in his insurance business, and work done in such a way or under such circumstances as to have the same binding force on the company as though the agent had done it all. * * * Butler goes, and brings back an application, Manley looks it over, puts his name on it as agent, and sends it forward, and a policy is issued thereon. In the absence of any fraud, that application would stand just the same as though Manley had done the whole thing in person, provided the act was done under such circumstances that the company knew or ought to have known that a clerk would be employed by and to act for the agent Manley, in such a manner and in such a way.

Take this case : Mr. Manley is a lawyer at West Rutland; has an office there for doing law business. This company appoints him their insurance agent. There is a large village there, a large constituency for this kind of business.

Now, the only question is whether the company ought to have known when they appointed him, that in the performance—fair performance of his duties as their agent there, he would necessarily need a clerk to aid more or less in the carrying out of the business of that agency. * * * If Butler had no agency for the company, and had no employment by Manley to solicit this insurance or aid Manley in it, but went on his own motion, acting independently of the company and its agent, Manley, and took this application as his own sole transaction, * * * and Manley took it from him as Mullin's application in the same way he would have taken it if Mullin had brought it to him, as an application made out by Mullin in person in which he, Manley, had taken no part himself or others, then the company was not affected by any misrepresentations made to Manley by Mullin, but had and have a right to stand on it as made, and to take advantage of its material false statement the same as though Mullin had made it all out himself, without additional statement to any one."

Butler's knowledge as to title of property :—

"I do not understand that the plaintiff is definite in saying he told Butler the same at the time of the application. It is for you to say. If Butler previously knew how the title stood, etc., and there had been no change in it, it would not have been necessary for the plaintiff to go into detail at the time of the application. If he had said to Butler, "You know just how the title stands; it is just as we talked when you were at work on my books," that would have been sufficient. If the plaintiff at the time of negotiating the application with Butler said enough to give him fairly to understand that the title had not been changed since he knew about it, but stood just the same, that was sufficient. Butler should have put it down as the fact was; and the plaintiff should not suffer because he did not, provided Butler stood in such relation to Manley as to bind the company as above explained."

Fraud in proof of loss :—

"The plaintiff had a proof made out, swore to it, and presented it within thirty days. It turns out that he embraced some articles not lost. And it is claimed that he put values too high. It was the duty of the plaintiff to present an honest statement of his loss; knowingly and intentionally including in it articles not lost, or putting value to articles lost too high, for the purpose of getting more than entitled and thus defraud the company, would work a forfeiture of all claim.

There is no dispute on this point. The question is one of fact. Did he do this? Here is the issue. Did he intentionally present a sworn statement of loss that was false, that contained misrepresentations, that was fraudulent?

This question embraces two questions, (1) Whether the statement was false in fact? (2) Was that intentional or by mistake?

The plaintiff explains how the statement was made and what he said when he presented it; says he did not know the silverware was saved; and told Fletcher, agent to adjust the loss, the silk dress was saved and should be deducted, although it was included in the statement. Fletcher denies this; and the defendant has put in evidence such facts as it is claimed tend to show misrepresentation, fraud, and false swearing by plaintiff.

There is considerable circumstantial evidence on both sides bearing on this point of good faith, and it is upon the whole that you are to say whether the errors such as you find exist in the proof of

loss were mere oversights, mistakes, inadvertences, errors of judgment as to the price of values, honest over-estimates, or whether there was substantial misrepresentation, fraud, or false swearing.

The plaintiff had the right to have his wife or any other person make the paper; but that did not relieve him from obligation to be honest himself in adopting it and swearing to it. He is not responsible for any attempted frauds of his wife or others to which he was not a party.

The other facts are sufficiently stated in the opinion.

JAMES C. BARRETT, for Defendant.

No relation, either of dealing or of knowledge, between Butler and the company having been shown, but only the acting of Butler, the court erred in what it said in its charge as to Butler's being agent of the company, namely: "If you are fairly satisfied upon the evidence that Butler was the defendant's agent" etc., and other similar expressions. Was there any partnership? As already said, there was no evidence or even claim that there was any partnership which, as such, was the agent of the company. If, therefore, Butler derived any powers, it was not as a member of a partnership which was agent, but must have been as a partner of an agent. But Butler does not pretend that he had any agency derivative through Manley. He said he supposed he was as much agent as Manley—not as expressed by the court that he had any sub-agency. What basis of fact is there in all this upon which to submit to the jury any proposition upon the idea of Butler having powers derived from a partnership? and even if there had been any basis of fact, the matter would, in point of law, come to just this: that Butler derived powers by virtue of being a partner of an agent who had no authority to delegate his powers, and who, even if had had such authority, was not even claimed to have exercised it. The record is indisputable against the idea of a clerkship. Butler was an insurance broker and brought the application from Mullin in the character of applicant to Manley, the agent of the company; and the same is true when the application was returned for further answers. Manley, the agent then returned it for such additions to Butler, the broker, who in the character of applicant and for the applicant, had brought it to Manley, the agent. There was no change of character or relation, and none was claimed. Manley's only part in and relation to the matter was simply the exercise of his strict agency, which was as the record expressly states, "to receive and forward applications;"

and the record also states that "it did not appear that said Manley had any knowledge upon the matters in question."

Now, even evidence had been admissible that Mullin told Butler at the time of the application what the title was, evidence was not admissible, that he had told him some three months before, and while Butler was in his employment what the title was.

Of course, knowledge acquired by Butler at that time and under those circumstances, would not bind the insurance company: Wood on Ins., Sec. 404; 30 Mo., 68, 71.

The insured was bound to know whether there was any agency, and to know the scope of the agency: White vs. Landon, 30 Vt., 599; Sprague vs. Train, 34 Vt., 150; Goodrich vs. Tracy, 43 Vt., 314; Cooper vs. Farmers' Mutual Fire Ins. Co., 50 Penn. St., 299; Wood Ins., p. 652, Sec., 397; and to prove it: Wood on Ins., p. 649, Sec., 396; *ib.*, p. 663, Sec., 309.

The representations being warranties, the agent's knowledge is unavailing: Tebbetts vs. Hamilton Mut. Ins. Co., 3 Allen, 569; Sheldon & Co. vs. Hartford Fire Insurance Co., 22 Conn., 235; Cooper vs. Ins. Co., *supra*.

Want of knowledge or of recollection no excuse: Towne vs. Fitchburg Mut. Fire Co., 7 Allen, 51; Wilbur vs. Bowditch Mut. F. Ins. Co., 10 Cush., 446; Wood Ins., Sec. 397; 6 Cush., 42; 2 Denio, 75; 3 Allen, 569.

The burden is on the party claiming estoppel to show the facts operating as such. Mullin must show that Butler was agent, or partner, or clerk, or something else belonging to the company; and that, as such, he had full knowledge: Smith vs. Saratoga Co. Mut. Fire Ins. Co., 3 Hill, 508; Garlinghouse vs. Whitewell, 51 Barb., 208. The act of the agent is the act of the applicant: Wood Ins., Sec. 146. The acts of the agent must be within the scope of the agency: May Ins., Sec. 143; Richardson vs. Maine Ins. Co., 46 Me., 394; Ayeres vs. Hartford Fire Ins. Co., 17 Iowa, 176; American Ins. Co. vs. Gilbert, 27 Mich., 429; Lowell vs. Middlesex Mut. Fire Ins. Co., 8 Cush., 127.

There was no proof that the plaintiff "told Butler" that Carri-gan was lessee of the store. It was a concealment: Wood Ins., Sec. 216. The representations in the application are warranties, and a strict compliance is necessary: Wood Ins., p. 271, Sec. 137; Jennings vs. Chenango Co. Mut. Ins. Co., 2 Denio, 75; Chaffee vs. Ins. Co., 18 N. Y., 378; May Ins., Sec. 156. The burden of proving a

literal compliance is on the plaintiff: *Wood Ins.*, p. 866, Sec. 507; *Campbell vs. N. E. Mut. Fire Ins. Co.*, 98 Mass., 389, 390; *Wood Ins.*, p. 380, Secs. 196, 214, 223; *Carpenter vs. American Ins. Co.*, 1 Story (U. S.), 57; *Burritt vs. Saratoga Mut. Fire Ins. Co.*, 10 Cush., 446. "The law of insurance has been regarded as specially requiring the utmost good faith:" Redfield, Ch. J., in *Farmers' M. F. Ins. Co. vs. Marshall*, 29 Vt., 28.

The defendant's sixth and seventh requests should have been complied with. The very act itself of assuming the peril of speaking without knowledge is, and ought to be, held fraudulent: *Keys vs. Carpenter*, 3 Vt., 209; *Twitchell vs. Bridge*, 42 Vt., 72; *Cabot vs. Christie*, *ib.*, 121; *Wood Ins.*, Secs. 195 and 214.

REDINGTON & BUTLER, for Plaintiff.

The defendant is bound by the acts of Butler. It is certainly bound by the acts of its own agent. *R. L.*, Sec. 3,617; and an application taken or transmitted through a local agent is the act of the company, and such agent is the agent of the insurer and not of the insured: *R. L.*, S. 3,620; 20 Reporter, 465; *Wood Ins.*, pp. 686, 690; *Bodine vs. Ins. Co.*, 51 N. Y., 117; *Ins. Co. vs. Fahren*, 68 Ill., 463; *Bank vs. Ins. Co.*, 31 Conn., 517; *New vs. Ins. Co.*, 17 Minn., 123.

Conversations with broker admissible upon the question of agency: *Ly. F. Co. vs. Ward*, 90 Ill., 545; 93 Ill., 96. Question is, what was agent's apparent authority? *McCabe D. Co. Mut. Ins. Co.*, 14 Hun, 599. A solicitor employed by a local agent, is agent of the company: *Davis vs. L. Ins. Co.*, 18 Hun, 230. Agent may act within the general scope of his real or apparent authority: *Wood Ins.*, Sec. 383. In all cases the binding force of an act done or omitted by an agent is to be measured by his apparent authority and is to be determined by the jury: *Wood Ins.*, Sec. 403, p. 681. Butler's acts ratified: *Beal vs. P. F. Ins. Co.*, 16 Wis., 241; *Ins. Co. North Am. vs. McDowell*, 50 Ill., 120; *Greely vs. Am. Cent. Ins. Co.*, 60 Mo., 116.

Butler had knowledge of the title and occupancy of the property. He was informed by the plaintiff of Carrigan's relation to the business. Hence the company is estopped: *King vs. Ins. Co.*, 51 Vt., 569; *May Ins.*, Sec. 140; *Ins. Co. vs. Williams*, 13 Ins. L. Jour., 133; *Ins. Co. vs. Wilkinson*, 18 Wall., 222; *Williams vs. Ins. Co.*, 14 Ins. L. Jour., 708; *Bank vs. Ins. Co.*, 49 Vt., 442; *Wood Ins.*, p. 629. I might go one step further and assert that knowledge alone of the agent as to the title, occupancy, use, etc., etc., was sufficient to bind the company in the case at bar: *Roth vs. City Ins. Co.*, 6 McLean,

324; *Michael vs. Mut. Ins. Co.*, 10 La. An., 737; *Hing vs. Aetna Ins. Co.*, 42 Iowa, 46; *Sim vs. Ins. Co.*, 8 W. V., 474; *Gates vs. Penn. Fire Ins. Co.*, 10 Hun, 489; *Wood Ins.*, Sec. 400; *Masters vs. Madison Ins. Co.*, 3 Ben., c. 398; *Marshall vs. Col. M. Ins. Co.*, 27 N. H., 157; *Walsh vs. Vt. Mut. Fire Ins. Co.*, 54 Vt., p. 351.

Proof Loss. The verdict is conclusive that there was no fraud in the proof of loss. "The law is well settled that the swearing must not only be false, but it must be knowingly and willfully done." 16 Reporter, 593; 35 Mo., 148; *Mosley vs. Ins. Co.*, 55 Vt., 152; *Wood Ins.*, pp. 736, 746; *Sans. Ins. Dig.*, Secs. 2, 3, 5. The company must show that it was injured by the willfully false statement: *Stache vs. Ins. Co.*, 49 Wis., 89; *Shaw vs. Ins. Co.*, 1 Fed. Rep., 761; *Cabot vs. Christie*, 42 Vt., 121; *Wood Ins.*, pp. 736, 740. The elements of an estoppel in pais are wholly lacking here. The proofs of loss do not create the liability to pay the loss, but simply set running the time at the end of which the amount contracted for shall become payable, and at which action may be brought to enforce the liability: *Folger, Ch. J.*, in *McMaster vs. Ins. Co.*, 55 N. Y., 222. It must appear insured knew the matters stated to be untrue: 14 Wall., 375; 35 Mo., 148; 4 Daly (N. Y.), 96; 6 Ind., 137; 61 Me., 67; 16 B. Mon. (Ky.), 411; *Clark vs. Ins. Co.*, 36 Cal., 168. The plaintiff is not liable for the fraud of his wife: 35 Miss., 391; 39 Md., 485; 23 Ind., 599. A principal is not liable for damage caused by a willful tort of his agent: 1 East, 106; 13 Ill., 277; 1 Hill, 480; 2 N. Y., 479.

POWERS, J.

The first question presented by the exceptions is whether J. D. Butler, in the matter of taking the application for the insurance in question, was so far acting for the defendant company as to make his knowledge of errors in such application knowledge of the company, and thus stop the company from claiming a forfeiture therefor.

It appears that Manley was a duly authorized agent of the company at West Rutland; that Butler was in his office and engaged to some extent in drumming for insurance, and that he and Manley divided the fees payable upon accepted applications in a proportion agreed upon between them. Butler, however, was not himself appointed or recognized by Manley or the company as an agent. When the application of the plaintiff was returned by the company for further information respecting the occupancy of the store and the ownership of the goods therein, Manley "handed it to Mr. Butler and requested him to go and get the reply, and that Mr. Butler

took the same and shortly after brought it back with the additional answers in Mr. Butler's handwriting." This is the defendant's evidence on this point, and upon it we are clear that the act of obtaining the reply to the company's questions was in legal significance the act of Manley rather than Butler. Butler was expressly directed by Manley to do this service, and in doing it he acted merely as the hand of Manley; and as the latter was confessedly the defendant's agent, this act was one done by its agent and in obedience to the company's directions. It is thus wholly unnecessary to consider the able argument of the defendant's counsel upon the question of Manley's power to create a sub-agent, or whether Butler had any of the functions of agency in the transaction. The business was done by Manley, and he ran the risk of any peril that might affect the company incident to it. It would be a dangerous doctrine to promulgate, if we held that the company could avoid its responsibilities by repudiating the acts of its own agents if they happened in large towns to be done in part by the assistance of persons employed by such agents. There was no error on this point of exceptions.

As to the tenancy of Carrigan: In strict legal parlance Carrigan was the owner of the goods in the store and tenant of the same. Mullin Brothers were the actual, visible tenants of the store and in visible possession of the stock. They were to become the sole owners when they paid Carrigan's debt. Butler knew all about the facts, and it is wholly unimportant when he acquired his knowledge—if he knew,—when under the directions of the company through its agent, Manley, he undertook to reply to the company's questions and made a wrong statement. It carries all the consequences that create an estoppel on the company.

The false representations as to the settlement by the Lycoming company if made, are wholly immaterial. The fraud, misrepresentation, and false swearing referred to in the by-laws, relate to the proofs of loss therein required to be made by the insured. The context leaves this beyond doubt. The plaintiff said nothing in his proofs of loss about the Lycoming loss. It was outside chaffer between him and Fletcher, and has no legal relation to his own loss. It is argued that this representation was made to induce the defendant company to settle his loss; but the company did not settle his loss; it did not rely on such representation nor apparently regard it in its own action. What has it suffered therefore from it or how could it suffer by means of it?

The plaintiff's wife made out the proofs of loss concerning the household goods, etc.

It is easy to see that respecting an inventory of household effects destroyed by fire the wife would in most cases be much better informed as to articles lost than her husband. What man of us under such circumstances could inventory the linen, bedding, crockery, and a thousand and one articles in his house if they were burned, without the aid of his wife? but if the plaintiff was compelled to get the aid of his wife, he assumes all responsibility for her errors as he would for his own.

The defendant's evidence tended to show that the wife included many articles not lost; some greatly overvalued, which had been purchased by the plaintiff himself, and some that he never owned at all. The plaintiff took his wife's inventory without scrutiny, swore to it, not knowing whether it was correct or otherwise; and it turned out to be greatly incorrect and false. Upon this evidence the defendant requested the court to charge that if the plaintiff adopted any false statement of the wife respecting a loss, or the value of goods lost without investigating the facts, he thereby became guilty of a fraud himself; and if he made representations assuming to know the facts when he had no knowledge, and such statements turned out to be false, it was a fraud within the meaning of the policy. The court did not answer these requests, but put these matters to the jury upon the theory of honest intention. In this was error. The company was entitled to a truthful inventory of the property lost. The plaintiff's duty under the policy was to supply it; his representations must be true in fact, he cannot even be honest by turning the matter over to his wife, and omit to inspect her inventory to see if it be correct. If he had looked it over and wished to be honest, he would have discovered many false statements which were calculated, and probably were intended, to work a fraud upon the defendant. He could have arrested this intended fraud if he had done his duty. On the contrary he recklessly indorsed it without examination, and by so doing made it his own fraud within the meaning of the policy.

If this vein of the evidence had been laid before the jury as requested by the defendant who had the right to a charge upon it, possibly the jury might have rendered a verdict less surprising than the one they did.

Judgment reversed and new trial granted.

SUPREME COURT OF THE UNITED STATES.

Appeal from the Circuit Court of the United States, for the Eastern District of Wisconsin.

PHOENIX INSURANCE COMPANY

vs.

ERIE AND WESTERN TRANSPORTATION CO. }

A stipulation in a bill of lading that the carrier shall have the benefit of any insurance on the goods is a valid one, and in such case, even though the loss be occasioned by the negligence of the carrier, the insurance company cannot be subrogated to the rights of the shipper to recover damages for such negligence.

If, as is well settled, a carrier may insure against loss, though occasioned by the negligence of his own employes, he may also lawfully stipulate with the owner of goods to be allowed the benefit of insurance voluntarily obtained by the latter.

Where goods were shipped under an oral agreement, with the understanding that bills of lading would be subsequently issued, and afterward and after the effecting of insurance by the shipper, bills of lading were issued containing a provision giving to the carrier the benefit of any insurance on the goods, which bills were not objected to by the shipper, and were similar to bills previously issued to him on other shipments, the contract of carriage is to be treated as if made on the day of the oral agreement and the insurance company claiming to be subrogated to the rights of the shipper is bound by the conditions of the bill of lading.

This was a libel in admiralty against a common carrier by an insurance company, which had insured the owners upon the goods carried, and had paid them the amount of the insurance and claimed to be subrogated to their rights against the carrier. The defense relied on was that by a provision of the contract of carriage, the carrier was to have the benefit of any insurance upon the goods. The district court held that this provision was valid, and therefore no right of subrogation accrued to the libellant, and entered a decree accordingly. The libellant appealed to the circuit court, which

found the following facts: The respondent was a Pennsylvania corporation, authorized to carry on the business of lake transportation, and engaged in business as a common carrier, and owned a line of propellers running between Erie and other ports on the lakes, called the "Anchor Line," one of which propellers was the *Merchant*. On July 24th, 1874, the firms of A. M. Wright & Co., owners of 16,325.34 bushels of corn, worth \$8,000; Elmendorf & Co., owners of 800 bushels of corn, worth \$600, and Gilbert Wolcott & Co., owners of \$370 bushels of corn and 680 bushels of oats, together worth \$800, caused to be shipped on board the propeller *Merchant*, then lying at Chicago, and bound for Erie, the grain aforesaid, consigned to themselves at other places beyond; and severally made oral agreements with the respondent, by which, in consideration of certain stipulated freight, the respondent agreed to transport the several parcels of grain from Chicago, by way of the lakes, to Erie, and thence forward them to their ultimate destinations; and it was tacitly understood that bills of lading for the shipments would be subsequently issued to the shippers, but nothing whatever was said respecting the terms and conditions thereof. After the goods had been received on board, and the propeller had departed on her voyage, the respondent delivered to the shippers, respectively, bills of lading, each of which described the goods as shipped on the propeller *Merchant*, and addressed to the owners by name at their ultimate destination, fixed the rate of freight from Chicago to that destination, and contained an agreement that the goods should be "transported by the Anchor Line and the steamboats, railroad companies, and forwarding lines with which it connects, until the said goods shall have reached the point named in the bill of lading, on the following terms and conditions," among which were these:—

"The said Anchor Line, and the steamboats, railroad companies, and forwarding lines with which it connects, and which receive said property, shall not be liable " "for loss or damage by fire, collision, or the dangers of navigation while on seas, bays, harbors, rivers, lakes, or canals; and where grain is shipped in bulk the said Anchor Line is hereby authorized to deliver the same to the Elevator Company at Erie, as the agent of the owner and consignee, for transshipment (but without further charge to such owner and consignee) into the cars of the connecting railroad companies or forwarding lines; and when so transshipped in bulk, the said Anchor Line and the said connecting railroad company or carrier shall be and is, in consideration of so receiving the same for carriage, hereby

exempted and released from all liability for loss, either in quantity or weight, and shall be entitled to all other exemptions and conditions herein contained.

"It is further agreed that the Anchor Line, and the steamboats, railroads, and forwarding lines with which it connects, shall not be held accountable for any damage or deficiency in packages, after the same shall have been receipted for in good order by consignees or their agents, at or by the next carrier beyond the point to which this bill of lading contracts.

"It is further stipulated and agreed that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for, during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage; and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

"And it is further agreed that the amount of the loss or damage so accruing, so far as it shall fall upon the carriers above described, shall be computed at the value or cost of said goods or property at the place and time of shipment under this bill of lading."

These bills of lading were received by the shippers, without protest or objection, and were signed by Elmendorf & Co., and by Wolcott & Co., but not by A. M. Wright & Co. The bills of lading were received by the shippers without specially reading the terms and conditions, their attention was not directed to them, nor was anything said respecting them; and no reduction of freight from the rates stipulated in the oral agreement was made in consequence of those terms and conditions, or other consideration paid therefor; but the shippers had often before shipped goods by this line under similar contracts, and thereby knew, or had every opportunity of knowing, the contents of these bills of lading. The propeller completed the lading of the goods during the evening of July 24th 1874, and about midnight departed on her voyage. About 10 o'clock the next morning, in a dense fog, she was stranded on the western shore of Lake Michigan, about ten miles south of Milwaukee, through the negligence of those managing her, and immediately filled with water, and all the grain became wet and damaged. One thousand two hundred bushels of it were thrown overboard to get off the vessel, and 5,188 bushels were brought into Milwaukee in a perishable condition, and

were there sold for the sum of \$1,037.60, which was retained by the respondent. On said twenty-fourth of July, the libellant, a New York corporation authorized to transact a general lake and insurance business, insured the shippers, at their request and expense, against loss or damage to these shipments from perils of the seas and other perils; and issued to them certificates of insurance, for \$8,000, \$520, and \$700, respectively, in this form:—

NO. 627. THE PHOENIX INSURANCE COMPANY, NEW YORK. \$8,000.

CHICAGO, ILL., July 24th, 1874.

This certifies that A. M. Wright & Co. [are] insured, under and subject to the conditions of open policy No. 2,263 of the Phoenix Insurance Company in the sum of \$8,000, on corn on board the propeller *Merchant*, at and from Chicago to Erie. Loss payable to assured, order hereon, and return of this certificate.

CHAS. E. CHASE, Agent.

The policy of insurance referred to in these certificates issued "Charles E. Chase, on account of whom it may concern," "lost or not lost, at and from ports and places to ports and places, on cargo, premiums to be settled monthly, upon all kinds of lawful goods and merchandise laden or to be laden on board" any vessel or vessels; and was otherwise in the usual form of an open policy of insurance for \$1,000,000 against marine risks, including perils of the seas, "barratry of the master and mariners, and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, or any part thereof;" and contained these provisions: "The company are to be entitled to premium at their usual rates on all shipments, reported or not. It is warranted by the assured to report every shipment on the day of receiving advices thereof, or as soon thereafter as may be practicable, when the rate of premium shall be fixed by the president or the vice-president of the company." "No shipment to be considered as insured until approved and indorsed on this policy, by C. E. Chase, agent." The shipments were duly approved and indorsed on this policy. On August 19th, 1874, the shippers abandoned the goods to the libellant as a total loss, by written instruments substantially alike, the material part of the one executed by A. M. Wright & Co. being as follows:—

CHICAGO, August 19, 1874.

For and in consideration of the sum of eight thousand dollars, the receipt whereof is hereby acknowledged, we do by these presents assign, transfer,

cede, and abandon to the Phoenix Insurance Company all our right, title, and interest in and to the property hereinafter specified, and to all that can or may in any way be made, saved, or realized from the damage or loss reported to have occurred by reason of which a claim of payment has been made by us, with full power to take and use all lawful ways and means (at the risk and expense of the Phoenix Insurance Company) to make, save, and realize the said property, to wit, 16,325.34 bushels of corn, as per bill of lading and invoice, shipped on board the propeller *Merchant*, bound from Chicago for Erie, and covered by insurance with the Phoenix Insurance Company by open policy No. 2,263, certificate No. 627, under date of July 24th, 1874.

In consequence thereof the libelant paid to the shippers the amount of the insurance as and for a constructive total loss. A general average adjustment was made on September 2d, 1874, and re-adjusted on February 1st, 1875, awarding to the libelant the sum of \$2,466.12 on account of these shipments.

The circuit court made and stated the following conclusions of law: (1) That the bills of lading were the contract by which the rights of the parties were to be governed; (2) that under them the respondent became liable to the shippers for the value of the shipments, by reason of the negligent loss of the same, and that the shippers had rights of action therefor; (3) that by the abandonments the libelant did not succeed to those rights of action of the shippers by reason of the stipulation contained in the bills of lading that "the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods;" (4) that the libelant was entitled to recover the sum of \$2,466.12, awarded to it in the general average adjustment, re-adjusted as aforesaid, with interest thereon.

The circuit court entered a decree for the libelant for this sum only, and the libelant appealed to this court.

GEO. A. BLACK and GEO. D. VAN DYKE, *for Appellant.*

GEO. B. HIBBARD, *for Appellee.*

GRAY, J.

It being found as matter of fact that the lading of the goods on board the propeller was not completed until the evening of the twenty-fourth of July, that she departed on her voyage about midnight, and that the bills of lading were not delivered by the carrier to the shippers until after her departure, it is clear that the bills of lading were not actually delivered until the 25th. But it being also found that oral agreements for the carriage were made on the

24th, with the understanding that bills of lading would be subsequently issued, and that the shippers having often before shipped goods by this line under similar bills of lading, knew or had every opportunity of knowing their terms and conditions, it is also clear that the bills of lading were but a putting in form of the oral agreements made on the 24th, and took effect as if they had been delivered and accepted on that day. The certificates of the agent of the insurance company, without which the policy of insurance did not attach to these goods, were also made on that day, and described the goods as on board the propeller. The contract of carriage and the contract of insurance must therefore be treated as substantially contemporaneous, and both made before the loss of the goods. There is nothing to show any misrepresentation or intentional concealment by the assured in obtaining the insurance, or that the insurer had or had not knowledge or notice of the usual form of the bill of lading. The policy of insurance contains no express stipulation for the assignment to the insurer of the assured's right of action against third persons. In the bills of lading, it is expressly stipulated that the carriers whose railroad or vessels form part of the line of transportation shall not be liable for loss or damage by fire, collision, or dangers by navigation; and that each carrier shall be liable only for a loss of the goods while in its custody, "and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods."

The question is whether, under the circumstances, the insurer, upon payment of a loss, became subrogated to the right to recover damages from the carrier.

When goods insured are totally lost, actually or constructively, by perils insured against, the insurer, upon payment of the loss, doubtless becomes subrogated to all of the assured's rights of action against third persons who have caused or are responsible for the loss. No express stipulation in the policy of insurance, or abandonment by the assured, is necessary to perfect the title of the insurer. From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them, is entitled, by way of salvage, to the benefit of anything that may be received, either from the remnants of the goods, or from damages paid by third persons for the same loss. But the insurer stands in no relation of contract or of privity with such persons. His title arises out of the contract of insurance and is derived from the assured alone, and can only

be enforced in the right of the latter. In a court of common law it can only be asserted in his name, and, even in a court of equity or of admiralty, it can only be asserted in his right. In any form of remedy, the insurer can take nothing by subrogation but the rights of the assured : *Comegys vs. Vasse*, 1 Pet., 193, 214; *Fretz vs. Bull*, 12 How., 466, 468; *The Monticello*, 17 id., 152, 155; *Garrison vs. Memphis Ins. Co.*, 19 id., 312, 317; *Hall vs. Railroad Co.*, 13, 367, 370, 371; *The Potomac*, 105 U. S., 630, 634, 635; *Mobile & M. Ry. vs. Jurey*, 111 id., 584, 594; *Clark vs. Wilson*, 103 Mass., 219; *Simpson vs. Thompson*, 3 App. Cas., 279, 286, 292, 293. That the right of the assured to recover damages against a third person is not incident to the property in the thing insured, but only a personal right of the assured, is clearly shown by the fact that the insurer acquires a beneficial interest in that right of action, in proportion to the sum paid by him, not only in the case of a total loss, but likewise in the case of a partial loss, and when no interest in the property is abandoned or accrues to him : *Hall vs. Railroad Co.*, the *Potomac*, and *Simpson vs. Thompson*, above cited.

The right of action against another person, the equitable interest in which passes to the insurer, being only that which the assured has, it follows that if the assured has no such right of action none passes to the insurer, and that if the assured's right of action is limited or restricted by lawful contract between him and the person sought to be made responsible for the loss, a suit by the insurer, in the right of the assured, is subject to like limitations or restrictions. For instance, if two ships owned by the same person come into collision by the fault of the master and crew of the one ship, and to the injury of the other, an underwriter who has insured the injured ship, and received an abandonment from the owner, and paid him the amount of the insurance as and for a total loss, acquires thereby no right to recover against the other ship because the assured, the owner of both ships, could not sue himself : *Simpson vs. Thompson*, above cited; *Globe Ins. Co. vs. Sherlock*, 25 Ohio St., 50, 68.

Upon the same principle, any lawful stipulation between the owner and the carrier of goods, limiting the risks for which the carrier shall be answerable, or at the time of making the claim, or the value to be recovered, applies to any suit brought in the right of the owner, for the benefit of his insurer, against the carrier, as, for instance, if the contract of carriage expressly exempts the carrier from liability for losses by fire (*York Co. vs. Central Rd.*, 3 Wall., 107), or requires claims against the carrier to be made within three

months (*Express Co. vs. Caldwell*, 21 id., 264). or fixes the value for which the carrier shall be responsible (*Hart vs. Pennsylvania Rd. Co.*, 112 U. S., 331). So the stipulation, not now in controversy, in the bills of lading in the present case, making the value of the goods at the place and time of shipment the measure of the carrier's liability, would control, although in the absence of such a stipulation the carrier would be liable for the value at the place of destination, as held in *Mobile & M. Ry. vs. Jurey*, 111 U. S., 584.

The stipulation in these bills of lading that carriers "shall not be liable for loss or damage by fire, collision, or the dangers of navigation," clearly does not protect them from liability for any loss occasioned by their own negligence. By the settled doctrine of this court, even an express stipulation in the contract of carriage that a common carrier shall be exempt from liability for losses caused by the negligence of himself and his servants, is unreasonable and contrary to public policy, and therefore void: *Railroad Co. vs. Lockwood*, 17 Wall., 357; *Railroad Co. vs. Pratt*, 22 id., 123; *Bank of Kentucky vs. Adams Express Co.*, 93 U. S., 174; *Railway Co. vs. Stevens*, 95 id., 655. And it may be that, as held by Judge Wallace in a case in the circuit court, a stipulation that "no damage that can be insured against will be paid for," would not protect the carrier from liability for his own negligence, because that would be to compel the owners of the goods to insure against the negligence of the carrier: *The Hadji*, 22 Blatchf., 235. But the stipulation upon the subject of insurance in the bills of lading before us is governed by other considerations. It does not compel the owner of the goods to stand his own insurer, or to obtain insurance on the goods; nor does it exempt the carrier in case of loss by negligence of himself or his servants, from liability to the owner, to the same extent as if the goods were uninsured. It simply provides that the carrier, when liable for the loss, shall have the benefit of any insurance effected upon the goods.

It is conclusively settled, in this country and in England, that a policy of insurance taken out by the owner of a ship or goods, covers a loss by perils of the sea or other perils insured against, although occasioned by the negligence of the master or crew or other persons employed by himself: *Waters vs. Merch. Louisville Ins. Co.*, 11 Pet., 213; *Copeland vs. New England Ins. Co.*, 2 Met., 432; *Gen. Ins. Co. vs. Sherwood*, 14 How., 351, 366; *Davidson vs. Burmand*, L. R., 4 C. P., 117, 121. Any one who has made himself responsible for the safety of goods has a sufficient interest in them

to enable him to insure them. Contracts of reinsurance, by which one insurer causes the sum which he has insured to be reassured to him by a distinct contract with another insurer, with the object of indemnifying himself against his own responsibility (though prohibited for a time in England by statute), are valid by the common law, and have always been lawful in this country; and in a suit upon such a contract the subject at risk, and the loss thereof, must be proved in the same manner as if the original assured were the plaintiff: 3 Kent Com., 278, 289; *Sun Ins. Co. vs. Ocean Ins. Co.*, 107 U. S., 485; *Mackenzie vs. Whitworth*, L. R., 10 Exch., 142, and 1 Exch. Div., 36. So a common carrier, a warehouseman, or a wharfinger, whether liable by law or custom to the same extent as an insurer, or only for his own negligence, may, in order to protect himself against his own responsibility, as well as to secure his lien, cause the goods in his custody to be insured to their full value, and the policy need not specify the nature of his interest: *Crowley vs. Cohen*, 3 B. & Ad., 478; *De Forrest vs. Fulton Ins. Co.*, 1 Hall, 94, 110; *Waters vs. Monarch Ass. Co.*, 5 E. & B., 870; *London & N. W. Ry. vs. Glyn*, 1 id., 652; *Savage vs. Corn Exch. Ins. Co.*, 36 N. Y., 555; *Joyce vs. Kennard*, L. R., 7 Q. B., 78; *Com. vs. Shoe & Leather Ins. Co.*, 112 Mass., 131; *Home Ins. Co. vs. Baltimore Warehouse Co.*, 93 U. S., 527; *N. B. Ins. Co. vs. L. & L. & G. Ins. Co.*, 5 Ch. Div., 569.

No rule of law or of public policy is violated by allowing a common carrier, like any other person having either the general property or a peculiar interest in goods, to have them insured against the usual perils, and to recover for any loss from such perils, though occasioned by the negligence of his own servants. By obtaining insurance, he does not diminish his own responsibility to the owners of the goods, but rather increases his means of meeting that responsibility. If it were true that a ship-owner, obtaining insurance by a general description upon his ship and the goods carried by her, could, in case of the loss of both ship and goods, by perils insured against, and through the negligence of the master and crew, recover of the insurers for the loss of the ship only, and not for the loss of the goods, some trace of the distinction would be found in the books; but the learning and research of counsel have failed to furnish any such precedent. On the contrary, in one of the earliest cases in which the rule that a policy of insurance covers losses by perils insured against, though occasioned by the negligence of the servants of the insured, was judicially affirmed, the assured, being the

owner of a ship, had chartered her for a West India voyage, and by the usages of trade bore the risk of bringing the cargo from the shore to the ship. The policy was upon the boats of the ship, and upon goods in them; and the amount recovered of the insurer was for goods being carried from the shore to the ship in her boats, and lost by the wrecking of the boats in consequence of the misconduct and negligence of some of the ship's crew. Such was the state of facts to which Lord Chief Justice Abbott applied the language, cited and approved by Mr. Justice Story in *Waters vs. Merch. Louisville Ins. Co.*, 11 Pet., 222, and by Chief Justice Shaw in *Copeland vs. N. E. Ins. Co.*, 2 Metc., 442: "In this case the immediate cause of the loss was the violence of the winds and waves. No decision can be cited where, in such a case, the underwriters have been held to be excused in consequence of the loss having been remotely occasioned by the negligence of the crew. I am afraid of laying down any such rule; it will introduce an infinite number of questions as to the quantum of care which, if used, might have prevented the loss. Suppose, for instance, the master were to send a man to the mast-head to look out, and he falls asleep, in consequence of which the vessel runs upon a rock, or is taken by the enemy, in that case it might be argued, as here, that the loss was imputable in the negligence of one of the crew, and that the underwriters were not liable. These and a variety of other such questions would be introduced, in case our opinion were in favor of the underwriters:" *Walker vs. Maitland*, 5 B. & Ald., 171, 174, 175. So in the recent case of *N. B. Ins. Co. vs. L. & L. & G. Ins. Co.*, it was assumed as unquestionable that insurance obtained by a wharfinger would cover a loss by his own negligence: 5 Ch. Div., 584.

As the carrier might lawfully himself obtain insurance against the loss of the goods by the usual perils, though occasioned by his own negligence, he may lawfully stipulate with the owner to be allowed the benefit of insurance voluntarily obtained by the latter. This stipulation does not, in terms or in effect, prevent the owner from being re-imbursed the full value of the goods; but, being valid as between the owner and the carrier, it does prevent either the owner himself, or the insurer, who can only sue in his right, from maintaining an action against the carrier upon any terms inconsistent with this stipulation.

Nor does this conclusion impair any lawful rights of the insurer, His right of subrogation, arising out of the contract of insurance and payment of the loss, is only to such rights as the assured has,

by law or contract, against third persons. The policy containing no express stipulation upon the subject, and there being no evidence of any fraudulent concealment or misrepresentation, by the owner in obtaining the insurance, the existence of the stipulation between the owner and the carrier would have afforded no defense to an action on the policy, according to two careful judgments rendered in June last, and independently of each other, the one by the English Court of Appeal, and the other by the Supreme Judicial Court of Massachusetts: *Tate vs. Hyslop*, 15 Q. B. Div., 368; *Jackson Co. vs. Boylston Ins. Co.*, 139 Mass., 508.

In *Tate vs. Hyslop*, owners of goods insured against risks in crafts or lighters, had previously agreed with a lighterman that he should not be liable for any loss in crafts except loss caused by his own negligence, and did not disclose this agreement to the underwriters at the time of procuring the insurance. The sole ground on which it was held that the owners could not recover on the policy was that this agreement was material to the risk, because the underwriters, as the assured knew, had previously established two rates of premium, depending on the question whether they would have recourse over against the lighterman. Lord Justice Brett observed that, but for the two rates of premium established by the underwriters and known to the assured, the omission of the assured to disclose their agreement with the lighterman could only have effected the amount of salvage which the underwriters might have, and would have been immaterial to the risk, and consequently to the insurance: 15 Q. B. Div., 375, 376.

In *Jackson Co. vs. Boylston Ins. Co.*, it was adjudged that, in the absence of any fraud or intentional concealment, the undisclosed existence of a stipulation between the assured and the carrier, like that now before us, afforded no defense to an action on the policy.

It may be added that our conclusion accords with the decision of Judge Shipman in *Rintoul vs. N. Y. Cent. Rd.*, 21 Blatchf., 439; (s. c. 23 Am. Law Reg. N. S., 294, and note), as well as with those of Judge Dyer in the district court, and Judge Drummond in the circuit court, in the present case: 10 Biss., 18, 38. See, also, *Carstairs vs. Mech. & Tr. Ins. Co.*, 18 Fed. Rep., 473; *The Sidney* 23 Feb. Rep., 88; *Mercantile Ins. Co. vs. Calebs*, 20 N. Y., 173.

Decree affirmed.

Bradley, J., dissented.

COURT OF APPEALS OF NEW YORK.

ADOLPH GOLDSCHMIDT ET AL., *Appellants,*

vs.

MUTUAL LIFE INS. CO. OF N. Y., *Respondent.**

The policy required that the proofs of death should contain full and true answers to the questions relating to the life, health, and death, the statements of the physician, responsible acquaintance, and undertaker; also that in case of self-destruction only the net reserve should be paid. In the proofs disease of bladder was stated as cause of death, also that insured had violated no condition of the policy so far as known. In response to a further direction in case of coroner's jury to furnish verdict and all evidence on which it was based, a copy of such verdict and evidence was annexed which on its face showed suicide to be the cause of death, but with a statement that it was not admitted that there had been either such verdict or evidence, and that the copy furnished was only what according to information purported to be such verdict and evidence, the truth of the finding and evidence being also denied.

Held, That the proofs were not prima facie evidence that the insured died by his own hand.

Held, That the burden of showing that death has not resulted from suicide was not shifted upon the plaintiff by the copy of the verdict and evidence. Such copy was not required by the policy and was furnished as a matter of courtesy.

WM. G. WILSON, *for Appellants.*

ROBERT SEWELL, *for Respondent.*

DANFORTH, J.

This was an action brought by the plaintiffs, as assignees of two policies of insurance—one for \$3,500, the other \$1,500—issued by the defendant upon the life of one Oscar Edler. The defense was that he came to his death by suicide and so the defendants incurred

* Decision rendered, June 1, 1886.

no liability, but the answer contained an offer of judgment for \$231.96, being the amount of premiums received. Upon trial of the issue, the court ruled that the defense was made out, and directed a verdict for so much only as was admitted to be due. The correctness of this ruling turns upon the legal effect of answers and information given in connection with the preliminary proofs of death served by the claimants, and presents the only question suggested by the record.

The policy of \$3,500 was payable by its terms "in sixty days after due notice and proof of the death" of the life insured, unless among other things not material here, "he shall die by his own act or hand, whether sane or insane" in which case "the policy shall be null and void," and the company will return the premiums paid. The character or nature of the proof of death is not specified, nor other language used in reference to it than is above given. The other policy is different. It is payable "within sixty days after notice and the proofs hereinafter required of the death of said Oscar Edler shall have been furnished to the company at its office," and provides that "the proofs of the death by which this contract matures, shall contain full and true answers, under oath, to the questions in the company's blanks for proofs of death, relating to the life, health, and death of the person in question; and shall include (1) a statement of the extent and character of each and every claimant's interest in the policy; (2) the statement of the physician, or physicians if more than one, who attended the deceased during his last illness or within a year previous; (3) the statement of a responsible householder acquainted with the deceased; (4) the statement of the undertaker."

But the policy declared, "that the self-destruction of the person, whether voluntary or involuntary, and whether he be sane or insane at the time, is not a risk assumed by the company in this contract, but in every such case, the company will, upon demand made and the surrender of this policy, accompanied with satisfactory proofs of such death, within sixty days after its occurrence, pay the net reserve upon it held by the company at the beginning of the year in which death occurs."

The complaint stated that Edler died on the 27th of August, 1876, and in regard to each policy, that proofs of his death as hereby required were served upon the defendant. The answer admits the death of Edler at or about the time named, and "that proof of his death has been served upon it as in the complaint stated." As to the claim under the first policy, the defendants allege that the "said

Edler committed suicide, and took his own life by his own act and by his own hand," and as to the second, that he came to his death by self-destruction. They also put in issue the assignment by him.

Upon the trial the plaintiffs put in evidence the policies, and proved their title by assignment.

They then called Daniel Goldschmidt, who testified that he was one of the plaintiffs, and he was about to state the consideration of the assignments and the extent of plaintiff's claim under them when the defendant's counsel objected, and the proposed evidence was excluded. He then testified that he knew of Edler's death on the 27th of August, 1876; that he attended the funeral and saw his dead body. The defendant's counsel then placed in the hands of the witness certain papers, marked "Exhibit No. 1 for identification," containing proofs of death and other matters referred to in the second policy, and proved by him that the signature to the certificate was his own, and also that of the firm of which plaintiffs were the members. The exhibit contained various papers entitled as follows: 1st, claimant's certificate; 2d, attending physician's certificate; 3d, friend's certificate; 4th, undertaker's certificate, all upon defendant's blanks, and given in answer to questions framed by them. Among those addressed to the claimants, in paper called "claimant's certificate" are these questions and answers: "Place and date of death? No. 324 West Fifty-second Street, in the city of New York, as we are informed and believe, August 27, 1876.

A. Remote cause of death? Disease of the bladder and urinary organs.

B. When did the health of the deceased first begin to be affected? Not known to us, but we are informed and believe, several months before his death.

C. Immediate cause of death? Not known to us, other than he was afflicted by the above-mentioned disease.

D. Duration of last illness? Not known to us, except that he had been afflicted with the above-mentioned disease for several months before his death.

E. Give every particular in relation thereto within your knowledge. Not known to us, except that for several months he appeared

to be suffering severe pain, consequent as we suppose upon the above-mentioned disease.

Name and residence of every physician who attended and prescribed for deceased during the last year prior to death, or since he became out of health? Dr. F. Zinsser of No. 47 West Twenty-eighth Street, in the city of New York, as we are informed, prescribed for deceased during this period; we know of no other.

Did deceased violate any condition of the above-mentioned policy in respect to residence, travel, occupation, use of spirituous liquors, dueling, suicide, violation of law, or had he been convicted of felony? No, not to our knowledge.

Then follows this direction and answer: "In case of coroner's inquest, furnish the company with verdict of the jury, and all the evidence on which verdict was based? We are informed that what purported to be a coroner's inquest was held; we annex a copy of what is represented to us to be the verdict of the jury and of the evidence on which said verdict was based. But we do not hereby admit that there was any such inquest, verdict, or evidence, and we deny that the purported finding of such alleged jury was true or well founded, and we deny the fact alleged to have been found by such jury, and we deny the truthfulness of the alleged evidence on which said verdict was based."

Attached to the papers referred to is a copy of the testimony purporting to have been taken before the coroner, and a copy of the inquisition; in effect that a jury of seven, whose names are given, "upon their oaths and affirmations say that the said Oscar Edler came to his death by suicide by cyanide of potassium on the 27th day of August, 1876, at No. 324 West Fifty-second Street."

The plaintiffs rested.

The defendant's counsel then proposed to read the exhibit "for the purpose of basing a motion thereon, that the complaint be dismissed," "because the proofs of death show affirmatively on the face that this man did not die within any of the risks assumed by this company. They show that he died by his own hand."

The plaintiff's counsel objected, "except so far as they are evidence of the death as required by the rules of the company, and of the plaintiff's presentation of proof to the company under their rules," and separately objected to the proceedings before the coroner

being introduced in evidence as an admission of the plaintiffs, or as evidence of the statements contained therein.

Both objections were overruled and to each decision the plaintiff's counsel excepted. The trial judge then ruled "that the complaint should be dismissed unless the plaintiff showed how the death of Edler was produced; that as to it they had the affirmative." To this the plaintiffs excepted, and they giving no further evidence the defendant's motion was granted, and the complaint dismissed, but on application of defendant's counsel, and against the objection of the plaintiffs, the court subsequently ordered a verdict for the plaintiffs for the sum admitted by the defendants to be due.

In these rulings we think the trial court erred. In the first place, the complaint alleges and the answer admits the issuing of the policies, the death of Edler during the life of the policies, that proof of his death was served upon the defendants and demand of payment made, as set forth in the complaint. So far there was a complete case conceded, and if the plaintiff's title to recover had not depended upon their character as assignees, which was denied by the answer, no evidence could have been required on their part.

Under the first policy the obligation of the defendant became perfect in sixty days after death of Edler, and notice and proof of his death. No particular form of proof was specified in the policy, and the only reference to it is the clause which thus fixes the time when the money is to become payable. No doubt the company were entitled to such proof as would afford reasonable assurance that their liability for loss existed, but where the policy does not require specific information, nothing more can afterwards be required. Second, the company did, however, prepare inquiries upon the points named in the policy, and they were answered. They had from the claimant the time of death, its remote and its immediate cause. They also had much other information, to which the terms of this policy make no allusion. They had from a friend of Edler and from the undertaker who buried him positive statements on oath as to his death and actual burial, and his identity with the person insured. They suggested no defect in these respects. Nor was any suggested on the trial. The only claim was that the copy of the proceedings on the inquest given in addition to the proof required by the policy, made out a case of suicide, and required the plaintiffs to show the contrary. I can discover no principle upon which such a proposition can stand. The policy makes no provision for it. The original proceedings would not be evidence upon the issue. Its verity is not

admitted by the claimant; it is denied. It could not have been required by the defendant; it was not adopted by the plaintiff, but out of what must now seem ill-advised courtesy, was furnished to the defendants at their request. It contained matter which if properly substantiated, would have availed the defendants in maintaining an affirmative defense, but in no view suggested to us by the learned counsel for the respondents, could it, as now presented, change the burden from them to the plaintiffs. If by any process of reasoning any part could be taken as an admission of the plaintiffs, it must be taken as a whole, and so taken, is no concession of any fact, but a mere communication of hearsay evidence, the truth of which is at the same time denied enough to put the defendant upon inquiry, but in itself is no answer to the plaintiff's claim, even in the first instance.

It is argued that the court below was controlled by authority, and the case then cited is relied upon by the defendant to uphold the ruling, viz.: *Insurance Company vs. Newton* (22 Wallace, 32). Under what circumstances the proofs in that case were prepared does not appear, the statement being that "the proofs of death consisted of several affidavits, giving the time, place, and circumstances of the death of the insured, and the record of the jury upon the coroner's inquest." It may be inferred that the whole were verified by the claimant, and that they were called for by the contract of insurance, for the court held that "the preliminary proofs presented to an insurance company in compliance with the conditions of the policy of insurance, are admissible as *prima facie* evidence of the facts stated therein against the insured and in behalf of the company," and the courts say "the narration of the manner of the death of the deceased was so interwoven with the statement of his death, that the two things were inseparable."

In the case before us it is quite otherwise. The insurer raised no issue as to the preliminary proofs of death, and they were in all respects complete without the statement as to the coroner's inquest. Its contents formed no part of the representations of the claimants; the statements were not sworn to by them, nor presented as worthy of belief. They were in no respect bound by them. Nor were they necessary as in the case cited, to qualify the defendant's admission, on which the plaintiffs then relied.

I have spoken more particularly of the first policy. The second policy, as we have seen, contains other provisions concerning proofs of loss. They have been complied with literally. They do not

require the facts and circumstances attending the death to be set forth in the proofs, nor do they call for any information concerning an inquest or other examination. Under this policy, as under the other, the question was unwarranted, and although the circumstances stated were calculated to gratify curiosity, and perhaps serve a useful end, formed no part of the proofs called for, nor were they given as matter credited by the claimants. The insurer could, so far as it thought proper, regulate its conduct by any suspicions thereby excited, but it could not make use of the statement, as one binding upon the plaintiffs.

If the policy was void by reason of any act of Edler, or if his death was from a cause against which they had not insured it was for them, as the case stood, to make good the averment in the answer, and show by proof that the suicide alleged had been actually committed. It was not necessary for the plaintiffs to ask to go to the jury. The trial court in admitting the coroner's inquest and proceedings under it in evidence, and in deciding that the burden of showing that the insured did not die by his own hand as therein stated, was on the plaintiffs, committed errors in favor of the defendants and at their request. They cannot now object that some other course might have been taken. As the case stood no question of fact was in dispute, and the plaintiffs were entitled to recover.

The judgment appealed from should therefore be reversed, and a new trial granted, with costs to abide the event.

All concur.

SUPREME COURT OF PENNSYLVANIA.

Appeal From the Decree of the Orphans' Court of Philadelphia County.

APPEALS OF LOUIS C. MADEIRA)

AND

ADALINE L. MADEIRA.)

A, who was about to be married to B, offered to have a policy of insurance upon his life taken out in her name. This she declined to accept if so taken out. A then had the policy issued in his own name, and later married B. The policy was placed with other papers of A and B in a safety box, which A handed to B to give to her mother to keep for her. No actual assignment of the policy was ever made to B, but A a number of times mentioned that the insurance it evidenced had been effected for the benefit of B. A died intestate and without creditors. In a contest between B and certain relatives of A, as to whether the amount due upon the policy belonged to B or to the estate of A, *Held*, that under the circumstances it should be considered the separate property of B.

On April 18, 1878, Walter C. Madeira made an application to the Connecticut Mutual Life Insurance Company for an insurance of \$10,000 on his life. This was refused by the company at that time; but in April, 1879, a policy of insurance for \$5,000 was issued by the company, payable after his death to his heirs or legal representatives. The policy was taken out in the name of Walter C. Madeira, and stood in his name from that time until he died, on June 26, 1882. At the time the policy was taken out he offered to give it to Clara Neidhard, but she refused to take it because she was not then married to him, being simply engaged to him—they were, however, married on December 29, 1880. Nothing was said regarding any

* Decision rendered, February 15, 1886.—From *Eastern Reporter*.

transfer or gift of the policy until April 14, 1882, when he wrote to A. B. Denton, the agent of the company at St. Louis a letter, of which the following is a copy:—

PHILADELPHIA, April 14, 1882.

A. B. DENTON, Gen'l Agent Connecticut Mutual Life Insurance Co.,
St., Louis, Mo.:

DEAR SIR—Inclosed please find my check, No. 534, on St. Louis National Bank for \$86.50, in payment of premium due April 26th. Please advise receipt and oblige,

Yours truly,

WALTER C. MADEIRA.

If I wish to have policy payable to my wife, shall I get same done here by the Philadelphia agent?

In answer to this, Madeira received a letter, of which the following is a copy:—

A. B. DENTON, GENERAL AGENT FOR MISSOURI,
CONNECTICUT MUTUAL LIFE INSURANCE CO., }
ST. LOUIS, April 17, 1882. }

W. C. MADEIRA, Esq., 322 Walnut Street, Philadelphia:

DEAR SIR—I am in receipt of your favor of the 14th inst., with check, eighty-six and $\frac{1}{2}$ dolls., in payment of renewal on your No. 154,288, for which I inclose receipt.

I hand you a form of transfer, which you can write upon the policy yourself, should you wish to change it to your wife's benefit. The company will not require a notification of such transfer until the policy matures.

Yours truly,

A. B. DENTON.

Assignment should be dated and witnessed.

The form of transfer which was inclosed in the foregoing letter was in the following words, namely:—

PHILADELPHIA, PA., 1882.

In consideration of the sum of one dollar, to me in hand paid, and for other valuable considerations, I hereby assign, transfer and set over all my right, title and interest in the within policy, No. 154,288, to my wife. (Sig.)
Witness.

No transfer of the policy was, in point of fact, made by Madeira.

The letter of April 17, 1882, and the inclosure, both in Denton's handwriting, were found among Walter C. Madeira's papers after his death. Walter C. Madeira died on June 26, 1882, intestate and without creditors, leaving to survive him his widow Clara and his father and mother. The widow took out letters of administration upon the estate. The \$5,000 policy was claimed by her as her own

property; the father and mother claimed the one-half of it. After the administratrix filed her account an effort was made to surcharge her with the amount of the policy and interest.

The testimony showed that A. had always spoken of the insurance as having been effected for the benefit of his wife; and, further, that the policy had been placed in a tin box which was used for the keeping of the valuables of both Mr. and Mrs. Madeira, and that the husband had on one occasion told his wife to hand this box to her mother to keep for her.

The orphan's court refused to surcharge the administratrix as requested.

HOOD GILPIN and JOHN G. JOHNSON, *for Appellants.*

Authorities upon the law of gift: Campbell's Estate, 7 Barr, 100; McGuire vs. Adams, 8 id., 286; Withers vs. Weaver, 10 id., 391; Kidder vs. Kidder, 9 Casey, 269—overruled, Wentz vs. DeHaven, 1 S. & R., 317; Linsenbigler vs. Gourley, 56 Penn. St., 166; Pringle vs. Pringle, 9 Smith, 281; Trough's Estate, 75 Penn. St., 115; Zimmerman vs. Streeper, id., 147; Murphy's Estate, Long's Appeal, 5 W. N. C., 309; Roberts vs. Reed, 4 id., 355; 3 id., 453; Bowker's Estate, O. C., 5 id., 493; McGlade's Appeal, 11 id., 257; Bond vs. Bunting, 78 Penn. St., 210; Kennedy vs. Ware, 1 Barr, 445; Wells' Estate and Williams' Appeal, 15 W. N. C., 89; Fross et al.'s Appeal, 41 Leg. Int., 358; McDermott's Appeal, id., 367.

WILLIAM S. WALLACE and JAMES W. M. NEWLIN, *for Appellee.*

"An agreement entered into between husband and wife before marriage for the mutual settlement of their estate, and of the estate of either upon the other, upon marriage, even without the intervention of trustees, will be enforced in equity, although void at law, for equity will not suffer the intention of the parties to be defeated by the very act which is designed to give effect to such a contract." Story Eq. Jur., § 1,370. "In this country the validity of marriage settlements is generally recognized." Stilley vs. Folger, 14 Ohio, 649. The fact that the contract is not in writing does not affect it, because the Pennsylvania statute of frauds does not extend to contracts in consideration of marriage, and also because of its concerning personality only. Hence in this State, such a parol contract clearly proven is of equal force with a written one: Barr vs. Hill, Add., 276 (1795); Earl vs. Champion, 15 P. F. S., 196, Agnew, Ch. J. A parol marriage settlement of personality is not ipso facto void: Gacken-

bach vs. Brouse, 4 W. & S., 546; Magniac vs. Thompson, 1 Baldwin, 344; Larkin vs. McMullen, 13 Wright, 29; Lant's Appeal, 14 Nor., 279; Hunt's Appeal, 11 Out., 595. As to form of marriage settlement, see Schouler Dom. Rel., 265. "The construction of promises and agreements in consideration of marriage is large and liberal, not technical or refined." Macqueen's Husband and Wife, 248; Hurry vs. Hurry, 3 Desaus., 126; Tunno vs. Twezewand, id., 269. "As to the language necessary in a gift or grant to the wife, the question is one of good sense, of the true meaning and intention of the grantor or donor:" Riley vs. Riley, 25 Conn., 154; Tyson vs. Tyson, 2 Hawk. (N. C.), 472.

The following are instances where courts have construed agreements to be ante-nuptial settlements in order to carry out the intention of the parties: Acton vs. Peirce, 2 Vern., 480; Preble vs. Boghurst, 1 Swan, 309; Cannel vs. Buckle, 2 P. Wms., 243; Tisdale vs. Jones et al., 38 Barb., 523; Gause vs. Hale, 2 Ired. (N. C.) Eq., 241. See, also, Miller vs. Goodwin, 8 Gray (Mass.), 542; Stullman vs. Stullman, 2 Beas. (N. J.), 403; Smith vs. Chapell, 31 Conn., 589; Malone's Estate, 8 W. N. C., 181. The general meaning of "legal representatives" is executors or administrators, although it is construed differently when it is clear that the intention was to vest the estate in a different class of persons: Bliss Ins., 520; Loos vs. Hancock M. L. I. Co., 41 Mo., 538. In Milroy vs. Lord (4 DeG., F. & J., 264, 74), Turner, L. J., gives four ways of making a valid and effectual voluntary settlement, the last method being by the settler declaring that he holds in trust. He further says, "and if the property be personal the trust may, as I apprehended, be declared either in writing or parol." But the late English and our own cases go farther still than this. They go so far as to hold that where one attempts to make a gift, which fails because of a defective instrument, the writing which thus fails in law will in equity be regarded as a declaration of trust. This doctrine commences with *Ex Parte Pye*, 18 Ves., 140, where a power of attorney revoked by death was held to be good as a declaration of trust. This case was followed by *Richardson vs. Richardson*, L. R., 3 Eq., 686, and then by *Morgan vs. Malleson*, 10 id., 475, where a memorandum of a gift unaccompanied by delivery was held to be a good declaration of trust. Although the rule as expressed in these cases was doubted in two subsequent cases: *Heartley vs. Nicholson*, L. R., 19 Eq., 233, and *Richards vs. Delebridge*, L. R., 18 Eq., 11-13; it was again re-affirmed by the vice-chancellor in the late case of *Baddeley vs. Baddeley*, L.

R., 9 Ch. Div., 113, where he says he is not inclined to disagree with the cases of *Richardson vs. Richardson* and *Morgan vs. Malleson*, supra, notwithstanding the remarks of Sir G. Jessel in *Richards vs. Delbridge*. See, also, *Helfenstein's Estate*, 27 P. F. S., 328. Although at law gifts between husband and wife are void, still they will be sustained in equity so far as the husband and wife are concerned: *Schouler Dom. Rel.*, 284; *Gerlach vs. Coates*, 8 Wright, 43. Gifts by a husband require less proof than those of a third person: *Deming vs. Williams*, 26 Conn., 226. A valid gift of a chose in action made inter vivos may be made by mere delivery without writing: *Malone's Estate*, 8 W. N. C., 182; *Grover vs. Grover*, 24 Pick., 265; *Wing vs. Merchant*, 57 Me., 383; *Hackney vs. Vrooman*, 62 Barb., 650; *Camp's Appeal*, 36 Conn., 88. It is sufficient in the case of a gift of a life insurance policy, if the possession of the policy itself is passed over to the donee, although no formal assignment is made, for equity will uphold this transaction as an equitable assignment: *Bliss Ins.*, 547; *Crittenden vs. Phoenix Mut. Ins. Co.*, 41 Mich., 442. See *Chapman vs. McIlwrath*, 17 Am. L. Rev., 1,019.

GORDON, J.

Had Walter C. Madeira executed an assignment of the policy in question to his wife, the appellee, there could have been little, if any, doubt as to her right to the proceeds, though the delivery of that assignment had been evidenced by nothing more than its deposit in a box, or other receptacle, common to the use of both husband and wife; but, says Mr. Justice Sharswood, in *Bond vs. Bunting*, 78 Penn. St., 210: "Is not a gift an assignment, perfected by delivery, which debars the donor from revocation?" Undoubtedly it is, and this doctrine is recognized in *Gray's Estate*, 1 Barr, 327. It is, however, hardly necessary to refer to authorities in support of a principle now so well established. The difference will be found solely in the method of proof; in all other particulars an assignment without valuable consideration and a gift are alike. The legal requisition is that the intention of the donor be established by clear and precise evidence, and that the delivery be secundam subjectam materiam. Now, that Walter C. Madeira, in taking the policy on his own life, intended it exclusively for the benefit and use of his wife cannot, if we adhere to the evidence, be very well doubted. He desired in the first instance, and before their marriage, to have it drawn to her use, but she, from feelings of delicacy, requested him not to do so. Not the less, however, did he design a gift of

this policy to her; his declarations to this effect are clear and positive, and made, not only at and about the time he insured, but they were repeated frequently up to within a day or two of his death; nor, we think, can there be any serious doubt concerning the validity of the delivery of this paper, especially as the matter does not affect creditors, but is merely a contest between the wife and volunteers. The policy was put into a tin box which contained, as she testifies, "the North American Insurance stock that was in my name, and everything that he and I had together; everything that I owned was in that box. I had no valuable papers anywhere except what was in that box." This box was delivered to her by her husband. She says: "The tin box when he went out to Madeira's was taken out of my trunk, and Walter asked me if I would give it to mamma to keep for me. I gave it to her, remember saying, 'I want you to keep this box, because it contains all our worldly goods.'" In the keeping of Mrs. Neidhard that box remained until after Madeira's death. We think, as between husband and wife, this was a sufficient delivery. It is true she did not take the policy out of the box, and put it beyond her husband's reach, as she might at any time have done. But why should she do so? She had no reason to doubt the intention of her husband, or to suppose he would revoke his gift, and, moreover, it was never out of her possession from the time of its delivery till after the death of the donor, for it was expressly committed to Mrs. Neidhard's custody for her. Certainly this delivery was quite as complete as that in the case of Crawford's Appeal, 11 P. F. S., 52, where a husband directed a clerk to enter on his books a credit to his wife in the sum of \$3,000, and annually added the interest thereto until his death. There was in this case no delivery which was good for anything either as against the husband or his creditors, yet as against volunteers, it was held to raise a valid trust in favor of the wife. We would, indeed, regard it as a very ungracious task were we compelled to take the gift of a kind, though perhaps, careless husband to his confiding wife, and transfer it to those for whom he never intended it. It is true, we would do so did the law and facts of the case so determine, and so doubtless would the court below have done under like circumstances, but as the matter now stands, as facts and law are with the appellee, we are the rather pleased to affirm the decree of the orphans' court.

The appeal is dismissed, and the decree affirmed at the costs of the appellants.

SUPREME COURT OF MICHIGAN.

RICHARDS

vs.

WASHINGTON F. & M. INS. CO.*

The insured property was described as used for a residence and stores and the application was a warranty. The agent acted on his own knowledge and not on the application in making out the policy.

Held, That the fact that a portion of the premises was used for a restaurant and a bakery will not work a forfeiture, nor was it necessary to specify the presence of a brick oven where the agent was familiar with the premises.

Held, That inaccuracies in the diagram connected with the application regarding adjacent buildings which are corrected in the agent's report are not a ground of complaint.

Held, That where the agent authorized to issue the policy prepared such application and contract as he elected from familiarity with the property, imperfections in the representations of the insured cannot be complained of.

HOWELL & CARR, *for Plaintiff*.

E. C. CHAPIN, *for Defendant and Appellant*.

CAMPBELL, C. J.

March 7, 1855, plaintiff procured insurance from defendant's agent, Judge Clisbee, at Cassopolis, on a brick building in that place, consisting of two stores on the ground floor and a residence above, the latter being occupied by plaintiff and his family. One of the stores was occupied by G. V. Bailey as a general store for dry goods, groceries, and other articles. The other was used as a restaurant and bakery, and had a large brick oven in the basement. On the

* Opinion filed, April 8, 1886.

twentieth of April, 1885, the premises were destroyed by fire, which originated in Bailey's store, and for which plaintiff was in no way responsible. After the fire plaintiff made his proofs, and the only objection suggested on behalf of defendant against his right to the insurance money was the omission to state in his application for insurance the existence of the brick oven. Having sued upon the policy, a plea was put in, with notice under the general issue that the policy was issued on a written application, wherein he covenanted that his answers and the survey thereon were a just and true explanation of everything material to the risk, and that they formed part of the policy, and in case any untrue answer was given it was to be void; that there were two material misrepresentations,—one as to the proximity of a wooden building represented as five feet distant, and the other as to the use of the building for stores and residence; and that by means of these statements he secured the policy, and led defendant to carry the risk, at inadequate rates.

Upon the trial it appeared that the policy did not make any reference to the application, although it contained a clause that whenever a policy did refer to one it should be a part of the policy, and operate as a warranty. It contained the usual clauses concerning the effect of false statements and material omissions in any shape. It further appeared, without dispute, that the agent at Cassopolis was not only generally familiar with the premises, but examined them for himself, saw the oven and its surroundings, and knew the relative positions of the buildings. He drew up and filled the application and plan in all its parts himself, without any help or suggestion, and plaintiff signed it. There was a conflict of testimony concerning the date of the application,—whether made before or after the issue of the policy. There was no question but that the agent acted in making out and delivering the policy on his own knowledge, and not in reliance on the application, concerning the character, position, and occupancy of the building. The policy was not issued at the home office, or at any general agency, but the Cassopolis agent himself decided upon it, and issued it upon his own authority. He testified that he did not regard the oven as increasing the risk. The general State agent made no objection to payment except because of the oven. He did not, in his testimony, state that it increased the risk, but, in a general way, referred to the rates as less than he thought the company would have taken on the brick building, and that they would have added further to them had they known the nearness of the wooden building. As under the decisions no reliance

can be had on objections not specified, no reference need be had to any of the other claims of omission or false suggestion, although the court charged that if plaintiff deceived the agent, or colluded with him, or knowingly or purposely made any misrepresentations or withheld any material facts, and thereby obtained lower rates, he could not recover. The jury must have negatived any such conduct.

The court held that if the application was made out after the policy, it could not bear upon the case; and this, we think, was correct, as it only appears in the pleadings as made before the policy, and forming a part of it. It was also held that, in the absence of fraud, plaintiff should recover. This was also correct, as the plea rested on that defense. But, in connection with the other parts of the charge, the jury were given to understand that any known material misrepresentation or concealment would amount to such fraud, as defined; and they were sufficiently informed of their duty provided the charge was right in regard to the other matters now to be referred to.

The whole controversy, although requests were presented in different forms, really turned on how far plaintiff could rely on the fact that Judge (lisbee drew up the application, as on all other points the fault was negatived by the jury.

The two alleged errors in the description were the distance between an adjacent wooden building and the brick building, and the represented use of the brick building. The only thing in the application bearing on proximity is a printed blank of diagram, divided into squares of 10 feet each. Upon that diagram the size of each building is marked out, and colors are used to designate the material. In the printed record two of these diagrams are inserted,—one in the application, and one in the agent's report to the company. No questions are asked or answered in the application on the subject. In both diagrams the wooden building would appear to be about five feet from the brick; but in both of them two other wooden buildings are represented as nearly ten feet nearer than they actually are. In the agent's report, made immediately after the policy issued, the questions are more searching than those on the application, and the answers are explicit, and it appears just how far off each wooden building was, and the building nearest is stated to be adjoining. The company itself could not mistake this information, assuming that it could have objected to a misstatement in the application.

The other objection is that the use of the building is stated to be for stores and residence, and that a restaurant and bakery is not a

store. The question presented cannot be regarded as whether this language is technically accurate. It can only be material if so inaccurate as to mislead to the extent of probable prejudice and injury. The word "store" is commonly used in this country as the equivalent of the English word "shop," which is very generally applied to what we call a "bakery," as it is to any room or building where any kind of article of traffic is sold. The American word "store" applies to the building,—the name more strictly belonging to the collection of wares within it. The English "shop" is the building itself, as distinguished from a place of sale which is open, like a "stall." Rich. Dict., "shop." A "restaurant" has no more defined meaning, and is used indiscriminately for all places where refreshments can be had, from the mere eating-house or cook-shop to the more common shops or stores, where the chief business is vending articles of consumption and confectionery, and the furnishing of eatables to be consumed on the premises is subordinate. The testimony does not indicate that a restaurant or a bakery is more dangerous than any other grocery or provision store, and the fact that the impropriety of using the phrase "store" does not appear to have occurred to either the general or local agent, or to any one else, until this suit was brought, is reason enough against our attempting to declare, as matter of law, that the word is dangerously misleading, and a misrepresentation. Those gentlemen are both intelligent, and acquainted with the usages of correct language, and if dictionary makers fail to approve certain uses, it does not follow that the people who resort to them are wrong, or that they do not know what they mean by their own terms. Neither have we any right to say, as a matter of law, that a brick oven is so unusual that a failure to mention its existence in a house or other building is presumptively fraudulent. It is not many years since such ovens were found in all comfortable dwellings, as well as in bake-shops and other places where cooking is done, and their presence was taken for granted, and not deemed hazardous. These matters, therefore, cannot be dealt with theoretically. The burden was upon defendant to show that plaintiff had made material concealments or misrepresentations. It is therefore of the first importance to know how far he can rely on the action of Judge Clisbee, the agent who insured him.

This case stands before us entirely free from any of the complications arising from the duty of members of mutual insurance companies to know their rules and by-laws and the conditions of

membership. Neither is it affected by those rules which have sometimes been applied to applications which are to be transmitted elsewhere to procure insurance from a home office. Where a local agent has authority to issue policies himself, the applicant for insurance, in the absence of fraud, may generally deal with him as he would with the officers of the insurance company, and rely on his conduct as he could on theirs. He was not bound, in the present case, to tell the agent what the agent assumed to know, and did know; or to assume that it was his duty to consider as material, and to express in words, what the agent knew, and did not treat as material or necessary to be written down. When the undisputed facts show, as they did here, that there is not a single fact relied on that was not fully known to Judge Clisbee, and that he, with knowledge of them all, prepared such an application as he regarded as proper and complete, and then acted upon his own knowledge in taking the risk, there is nothing left of the case, and all the other questions become immaterial, unless he and plaintiff were in collusion to commit a fraud, which was not charged by the company, and which is negatived by the verdict. Our own decisions cited on the argument need not be repeated on this head.

The views we have expressed render it needless to go over, one by one, the assignments of error, which are all covered by them. We think the jury could have been allowed to reach no other conclusion, and the judgment must be affirmed.

The other justices concurred.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

*In Error to the Circuit Court of the United States for the District
of Massachusetts.*

ABBY KNAPP, *Plaintiff in Error,*

vs.

HOMŒOPATHIC MUTUAL LIFE INS. CO.*

The application provided that failure to pay the premium when due should work a forfeiture except as otherwise provided in the policy. The policy provided that it should not be forfeited by reason of failure to pay the premium, but might be continued in force for such term or amount as the reserve would pay for; provided, that unless the policy should be surrendered and the paid-up policy applied for within ninety days after the non-payment, the policy should be void. The policy, which was taken out on the life of the husband by him as attorney for his wife and in her name, was afterwards surrendered by him on the false representation that the wife was dead and a new policy was taken, which afterwards became forfeited through non-payment of premium.

Held, That the fraudulent cancellation of the first policy through the husband did not affect the rights of the wife, but the subsequent non-payment of premium and failure to apply for a paid-up policy worked a complete forfeiture according to its terms.

This was an action brought March 19, 1878, by a citizen of Massachusetts against a corporation established by the laws of New York, upon a policy of insurance, by which the company, "in consideration of the representations made to them in the application for this policy, which is hereby made a part of this contract, and of the sum of \$47.40 to them in hand paid by Abby Knapp, wife of Charles L.

* Decision rendered, April 5, 1886.

Knapp, and of the quarterly payment of a like amount on or before the sixteenth days of July, October, January, and April in every year during the continuance of this policy," insured the life of the husband, for the sole use of the wife, in the amount of \$5,000 for the term of his natural life, beginning on April 16, 1869, payable at the office of the company in New York to her, if living, in thirty days after notice and proof of his death.

The application declared that "neglect to pay the premium on or before the day it becomes due shall and will render the policy null and void, and forfeit all payments made thereon, unless otherwise specially provided for in the policy."

The policy contained the following clause : "This policy of insurance, after two annual premiums shall have been paid thereon, shall not be forfeited or become void by reason of the non-payment of premium; but the party insured shall be entitled to have it continued in force for a period to be determined as follows, to wit: The net value of the policy when the premium becomes due and is not paid shall be ascertained according to the 'combined experience' or actuaries' rate of mortality, with interest at 4 per cent per annum. Four-fifths of such net value shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of premium and the assumptions of mortality and interest aforesaid; or at his option may receive a paid-up policy for the full amount of premium paid; provided, that unless this policy shall be surrendered and such paid-up policy shall be applied for within ninety days after such non-payment as aforesaid, then this policy shall be void and of no effect."

A trial by jury having been duly waived, the circuit court found the following facts : The policy was issued April 14, 1869, in the city of New York, where the husband and wife then lived. It was taken out by the husband, who signed the application in the wife's name as her attorney. It was in the possession of the wife in 1871, and of the husband before and afterwards. The premiums were paid for several years, mostly by the husband, but one or two by the wife. She lived apart from her husband nearly all the time after February, 1872. On January 16, 1874, a premium became due and was not paid. On February 26, 1874, the husband represented to the company that his wife was dead, the company believed the representation to be true, and he surrendered the policy, taking from the company \$260 in money and a new policy, concerning which the

only evidence was that it had been forfeited before his death, which happened September 17, 1874. Very soon after his death, the wife sent to the company for information about the policy, and her agent was told by the company that it was forfeited. A considerable time after this, being advised that she might have some rights under the policy, she gave due notice and proof of loss, and more than thirty days afterwards brought this action to recover the full amount insured. The net value of the policy when the non-payment of the premium occurred, if reckoned in the mode pointed out in the policy, would have been sufficient to continue it in force until after the death of the husband.

On these facts, the circuit court ruled as matter of law that the policy was forfeited by the neglect to pay the premiums and to call for a paid-up policy, and rendered judgment for the defendant, and allowed a bill of exceptions tendered by the plaintiff.

Gray, J., after stating the case as above reported.

The canceling of the policy, in consequence of the husband's fraudulent representation that the wife was dead, had no effect upon her rights. It is not relied on by the defendant; and there is nothing in the case to show that it in any way influenced the conduct of the plaintiff by preventing her from paying the premiums or making the election required by the policy.

The contract of insurance, made and to be performed in New York, between a corporation and a citizen of that State, is to be governed by the law of New York. By that law, in respect to the payment of or the neglect to pay premiums, a married woman stands like any other person insured: *Baker vs. Union Ins. Co.*, 43 N. Y., 283. And there is no statute which affects this case.

The decision, therefore, depends upon the true construction of the non-forfeiture clause in the policy.

The single purpose of this clause is that, after two annual premiums shall have been paid, a failure to pay any subsequent premium shall not have the effect of avoiding the whole insurance, but the assured shall have the right to an insurance for such a sum and such a time as the premiums already paid would equitably cover. The policy does not declare that it shall continue of itself, without any act of the assured. On the contrary, it stipulates that "the party insured shall be entitled to have it continued in force for a period to be determined" by ascertaining, according to certain rules, the net value of the policy at the time of failure to pay a

premium, and making the amount of that value, considered as a single premium, the basis for determining the time for which there shall be a temporary insurance for the full amount of the original policy. It then prescribes an alternative by which the party insured, "at his option, may receive a paid-up policy for the full amount of premium paid."

In short, the forfeiture of the policy, by a failure to pay any premium after the first two, is not absolute, but qualified; and the party insured is entitled to be insured according to the sum already paid in premiums, either for the full amount of the original policy, so long as that sum would pay for it, or else for the full term of the original policy for such amount as that sum would pay for.

Then follows the proviso: "that unless this policy shall be surrendered and such paid-up policy shall be applied for within ninety days after such non-payment as aforesaid, then this policy shall be void and of no effect."

It is contended on behalf of the plaintiff, that the words "such paid-up policy" show that this provision refers only to a new insurance determined by the second method, that is, for the full term of the original policy, and for an amount depending upon the sum already paid in premiums; and that if the assured does not seasonably apply for such an insurance, she stills remains insured for the full amount for a time computed according to the sum paid.

But the proviso does not say that upon a failure to surrender the original policy and to apply for a paid-up policy, the original policy shall stand good for a temporary insurance; but that it "shall be void and of no effect." The result of either of the two methods already prescribed, for determining the extent of the insurance, is a paid-up policy. According to either method, there is to be no further payment of premium, nor is the original policy continued in force; but the assured is to have the benefit of the sum already paid in premiums, by being insured, either for the amount of the original policy for a time to be determined, or for the time of the original policy for an amount to be determined. Taking the whole clause together, it is clear that the assured is to have the benefit of that sum in one of two ways at her election, and that election must be made within a certain time. As that time expired without any election, or any excuse for not making one, the forfeiture became complete under the express provisions of the policy, and the circuit court rightly held that the action could not be maintained.

Judgment affirmed.

COURT OF APPEALS OF NEW YORK.

SAMUEL MASSEY ET AL., *Respondent*,

vs.

MUTUAL RELIEF SOCIETY OF
ROCHESTER, N. Y., *Appellant*.*

A benevolent society was organized under the New York laws of 1875, whose certificate made no specific mention of life insurance, nor the restriction of benefits to members or their families as among its objects. The by-laws declared the object to be to secure mutual benefit to their members and aid to their families or their assigns, and that the benefits were to be paid the heirs or beneficiaries of the members.

Held, That the beneficiaries were not restricted to members of the family of the insured.

JOHN M. DUNNING, *for Appellant*.

N. C. MOAK, *for Respondent*.

RAPALLO, J.

The defendant was organized under chap. 267 of the laws of 1875 entitled "An act for the incorporation of societies or clubs for certain lawful purposes."

The purposes enumerated in the act, for which societies may be incorporated under it, are quite numerous, including social, political, sporting, literary, and other objects, and also "mutual benefit" and "benevolent" purposes. The subject of life insurance is not among the enumerated objects, unless it is embraced in the term "mutual benefit" or "benevolent." There is no restriction in the act which requires that the benefits or benevolence be confined to members of the families of the members.

Any five or more citizens of full age may form themselves into

* Decision rendered, June, 1, 1886.

such a corporation by making and filing the prescribed certificate, stating the name of the society and its particular business and objects, and they may adopt a constitution, by-laws, and rules.

The certificate of incorporation of the defendant, which was filed April 21, 1877, states the object of the society to be "to combine the efforts of all its members with the view to effect mutual relief, aid, and systematic contributions of benevolence and charity during their lifetime, and to their respective families, from time to time, when rendered necessary by sickness or pecuniary distress."

Here again there is no specific mention of life insurance nor any restriction of beneficiaries to the families of members, except when aid is rendered necessary by sickness or pecuniary distress, and from the context it is evident that this clause of the certificate treats of aid contributions to be furnished during the lifetime of the members respectively.

In the by-laws appears the first direct reference to anything of the nature of life insurance. Sec. 2. of article 1 of these by-laws declares that the objects of the society shall be to secure mutual benefit and protection to its members, and to furnish aid to their families or assigns in case of a member's death, and Sec. 3. states that "the plan of the society will be to issue certificates for a sum not to exceed \$2,000, to be paid to the heirs or beneficiaries of deceased members named in his certificate, from funds arising from assessments for the payment of death claims according to the schedule of rates hereinafter adopted." The by-laws then proceed to organize a system similar to that of a mutual life insurance company. A medical examination is required as a condition of admission to membership, an entrance fee and small annual dues are payable, and members are also required to pay assessments to meet death losses, on a scale graduated according to the age of the member at the time of his admission; and upon the death of each member, after the filing of the required proofs, the treasurer is required to pay to the legal representatives of the deceased member, or to such heirs or beneficiaries as are named in his certificate, the sum of two thousand dollars.

There is nothing in the by-laws which require that the beneficiaries named in the certificate should be members of the family of the deceased member, and if no beneficiaries are designated, the payment is to be made to his legal representatives.

The power of the company to create a fund for the insurance of the lives of its members is not questioned on this appeal, and we do

not therefore discuss it. The act of 1875 authorizes the incorporation of societies for purposes of "mutual benefit," and it must be under this head that the power is claimed to contract for the application of the joint contributions of the members to the payment of a gross sum to the legal representatives of each member, or to such beneficiary as he may designate to receive it, upon his death.

There is nothing in the act which restricts the objects of the societies formed under it to the relief of families of their members. They may be formed for general purposes of benevolence and for many other objects, such as social, political, athletic, sporting, etc. Neither does the certificate of association of the defendant restrict the application of its funds to the relief of a member of his family, except where such relief is to be extended during the life of the member.

But the by-laws disclose the plan by which the society proposed to carry out the object stated in the certificate, viz., "to combine the efforts of all its members with the view to effect mutual relief, aid, and systematic contributions of benevolence and charity during their lifetime" and this plan was to combine their contributions so as to secure mutual benefit to the members, and to afford aid to their families or assigns in case of a member's death, by issuing the certificates of membership before referred to, whereby the payment of \$2,000 was secured to the legal representatives of each member on his decease, or to such other beneficiaries as he might cause to be designated in the certificate. By this means each member, in consideration of the sums contributed by him to the funds of the society, became entitled to an instrument similar to a policy of insurance upon his life and was empowered to designate the person to whom the stipulated sum should be paid upon his death. This power was a present benefit to the member, as he might use it for the purpose not only of making future provision for some member of his family, or some other object of his benevolence, but even to raise money to supply his own immediate necessities, and it was no concern of the society in what manner he made it available. The society could not in any event escape the payment of the stipulated sum, for if, as it now claims, the designation of a person not a member of the family of the deceased was void, the payment would, according to the terms of the by-laws and certificate, be due to his legal representatives.

For the reasons stated we are of opinion, however, that the designation of Massey as a beneficiary was not in contravention of the

certificate of incorporation. That certificate did not contain the restriction which appears in the certificate of incorporation referred to in the case of *State vs. Central Ohio Mutual Relief Association* (29 Ohio State R., 403). In that case the certificate stated the objects of the association to be "For the mutual protection and relief of its members and for the payment of stipulated sums of money to the families or heirs of the deceased members of the association," and in *Folmer's appeal* (87 Pa., 135) the charter of the Relief Association declared "The object of this association shall be relief of widows, orphans, or families of deceased members." The language in the cases cited was clearly restrictive, but in the present case the certificate of incorporation is much more broad. It declares the object of the association to be to combine the efforts of the members with a view to effect mutual relief, leaving the details of the plan to be provided in the by-laws, and these by-laws provided for the system of life insurance before detailed, with the power to each member to designate any person he might choose, to receive payment.

The judgment should be affirmed with costs.

All concur.

SUPREME JUDICIAL COURT OF MAINE.

NATIONAL LIFE INS. CO. }

vs. }

HALEY AND ANOTHER.*

The premiums on a wife's policy were paid by the wife. Upon her death the husband by an arrangement with the company allowed the policy to lapse, and received in exchange another payable to himself on which he paid the premiums.

Held, That the rights of the wife became vested and could not be avoided by the substitution, the substituted policy stood in the place of the original.

Held, That as the representatives of the wife failed to look after their interests in the original policy and the premiums on the substituted policy were paid by the husband with an intention to benefit thereby without interference by the representative of the wife, the amount of the policy should be divided between the representatives of the husband and wife in proportion to the premiums paid by each.

DRUMMOND & DRUMMOND, *for Plaintiff*.

H. R. VIRGIN, *for Respondent Palmer*.

HAMILTON & HALEY, *for Respondent Haley*.

LIBBEY, J.

This is a bill of interpleader brought by the National Life Insurance Company against Abram Haley, administrator of the estate of Charles J. Haley, deceased, and Wm. C. Palmer, administrator of the estate of Julia A. Haley, deceased, to try the title to the insurance of \$1,000 by a life policy issued by the complainant on the life of said Charles J. Haley.

A decree was made requiring the said Abram Haley and Palmer to interplead, and upon the pleadings being filed the case was tried

* Decision rendered, May 26, 1886.

at nisi prius, and the presiding judge, with the aid of special findings by a jury, found the facts as follows: The orator on the 29th day of March, 1869, issued its policy of insurance No. 4,091, for the sum of \$1,000, upon the life of Charles J. Haley, payable upon his death, to his wife, Julia A. Haley, her heirs, executors, administrators, or assigns, requiring quarterly yearly premiums of \$4.88; and during the life of said Julia, she paid the premiums amounting to 165.92, and that upon her death in March, 1877, in order that the said Charles J. Haley might acquire to his own use the benefits of said policy of insurance, he and the orator contrived together to allow said policy to lapse from non-payment of premiums, and then said company issued to said Charles J. Haley a new policy of insurance for the same amount, requiring the same quarterly premiums, payable to said Charles, or his legal representatives, dated October 12, 1877, numbered 32,705. That upon said new policy the said Charles paid in premiums the sum of \$78.08, and died in September, 1881; that policy No. 4,091 was not given or assigned to Charles J. Haley; that Julia A. Haley had an interest in that policy at the time of her decease; that the heirs of Julia A. Haley had an interest in policy No. 32,705; and that there was other consideration for that policy besides what was expressed in it, the policy No. 4,091 being a part of said consideration.

The judge thereupon decreed among other things, that the insurance be divided between the said claimants in the proportions of the amounts of premiums paid by said Julia A. and Charles J. Haley.

Upon this part of the decree the whole contention between the parties arises; Palmer claiming that the estate of Charles J. is entitled to the whole amount of the policy, or at least to said sum less the amount of premiums paid by Julia A. for which amount her heirs, by the terms of the first policy, were entitled to a paid-up policy; while on the other side it is claimed that the estate of Julia A. is entitled to the whole sum insured.

We think the decree below, on the facts of this case, is correct.

The first question that arises is, was policy No. 4,091 forfeited by the devices resorted to by the insurance company and Charles J. Haley so that the heirs of Julia A. Haley no longer had any interest in the insurance? We think not. Charles J. Haley and the insurance company had no legal power, by direct agreement, to change the beneficiaries named in the policy. This proposition is too well settled to require citation of authorities. They could not accomplish indirectly by the means resorted to, without the knowledge or

consent of the heirs of Julia A., what they had no power to do by direct agreement. No such knowledge or consent is shown. We are aware that there is an apparent conflict among the authorities upon this subject, but we think an examination of the decided cases will show that the apparent conflict arises more out of the variant facts acted on by the courts in the different cases, than from any essential difference in the principles of law applied to them. But if there is a real conflict we think there is a decided preponderance of authority in support of the rule we apply to this case. The question was very carefully and ably considered in *Barry vs. Brune*, 71 N. Y., 261, in which the facts raised the same question under consideration, and the court held that the means used to cause the first policy to lapse, and a new one to be issued of like tenor, excepting the name of the beneficiary, were ineffectual to extinguish the right of Mrs. Barry, the beneficiary named in the first policy, to the insurance. In the opinion of the court, Earl, J., says: "It is clear that the old policies were the consideration of and inducement to the new policies. The new policies could not have been obtained but for the possession and surrender by Brune of the old policies, and the premiums upon the new policies were paid, in part, by a cash dividend due upon one of the old policies. Brune thus, by means of the possession of the old policies which belonged to the plaintiff, and by using and surrendering them, obtained the new policies. The real substance of the transaction was a substitution of the new policies for the old, for the purpose of getting the security which the old didn't give him under the circumstances of this case; both upon reason and authority, the substituted policies, in equity, simply take the place of the old policies, and the money payable thereon must go to the party entitled under the old policies. For this conclusion there is abundant reason and authority." The same rule is held in *Chapin vs. Fellows*, 36 Conn., 132; *Lemon vs. Phenix Life Ins. Co.*, 38 id., 294; and *Timayensis vs. Union M. L. Ins. Co.*, 21 Fed. Rep., 223. In the latter case the facts were similar to this case, except that the beneficiary did not procure the first policy and paid no part of the premiums.

The attempt to change the beneficiary named in the first policy being ineffectual, the remaining question is how shall the sum due on the policy be divided; courts have generally held that the beneficiary named in the first policy is entitled to the whole, but we think the facts in this case are, to some extent, different from those acted on by the courts which have so held, so far as we have observed

where it has been so held the facts were such that the beneficiary might well expect that the premiums were being paid by the person who had commenced paying them. In this case prior to the death of Julia A. Haley the premiums had all been paid by her. After her death her heirs had no reason to expect that Charles J. Haley would pay them. He was in no way liable for them. He paid them under a claim that he should have the benefit of them. This the heirs of Julia A. might have known in the exercise of due diligence in their affairs. What they might have learned in the exercise of due diligence equity will treat them as knowing. The insurance then was earned by the premiums paid by Julia A. Haley, for the benefit of herself and her heirs, and by the premiums paid by Charles J. Haley after her death for his own benefit. Upon the facts of this case we think the rule adopted by the court below is in accordance with the equitable rights of the parties, and that the fund should be divided between the two estates in proportion to the amount of premiums paid by each intestate. This is the rule adopted by Wallace, J., in *Timayensis vs. Union M. L. Ins. Co.*, *supra*.

Decree below affirmed.

Peters, C. J., Walton, Virgin, Emery, and Haskell, JJ., concurred.

SUPREME COURT OF APPEALS OF VIRGINIA.

CONN. FIRE INS. CO.

vs.

MERCHANTS AND MECHANICS' INS. CO.*

The property was insured independently by the mortgagee, the owner of the ground rents, and the lessee. A loss occurred and the property was replaced by one of the insurers of the lessee.

Held, That while entitled to contribution from its co-insurers of the same interest, the company replacing could not call upon the insurers of the other interests.

In order to entitle to contribution the insurance must be for the same person, on the same subject matter, and against the same risks.

JOHN S. WISE and W. W. & B. T. CRUMP, *for Appellant.*

GUY & GILLIAM, *for Appellee.*

Appeal from the Chancery Court of Richmond City. The opinion states the case.

HIXON, J., delivered the opinion of the court.

The only question in this case is whether certain insurance companies are liable to contribute to the expense of rebuilding certain property which was partially destroyed by fire, under the following circumstances :—

On the 2d of July, 1866, Douglas H. Gordon conveyed to Asa Snyder a lot of land, with improvements thereon, situated on the northeast corner of 10th and Cary Streets, in the city of Richmond, Va., subject to a ground rent of \$1,000, payable to said Gordon

* Decision rendered, April 15, 1886.

semi-annually, on January 1st and July 1st thereafter forever. Subsequently, Snyder incumbered this property by a deed of trust made to secure to one Thomas Wilson the return of certain bonds of the State of Virginia, which had been lent to Snyder by Wilson, and the payment of certain notes for money mentioned in the deed.

Afterwards, in April, 1877, Snyder became a bankrupt, and in the due course of the proceedings James H. Dooley was appointed his trustee in bankruptcy by the judge of the District Court of the United States for the Eastern District of Virginia.

In this condition of the title to the property, and while the property was in the possession of the trustee in bankruptcy, Gordon, the owner of the ground rent took out a policy of insurance upon the property for \$5,000 in the Merchants and Mechanics' Insurance Company of Richmond, Va., the obvious purpose and effect of which was to secure him against any loss of ground rent.

In the same month and year, but at a later day of the month, Snyder took out two risks upon the same property, loss, if any, payable to the estate of the said Thomas Wilson, who had in the mean while died. One of these policies was issued by the New York Bowery Fire Insurance Company, and the other was issued by the Equitable Fire and Marine Insurance Company of Providence, Rhode Island, and each of them was for the sum of \$2,058.

In February, 1880, Dooley, the trustee in bankruptcy, contracted with three insurance companies for insurance on the property in his hands, as trustee, to the amount of \$7,789.98.

These three companies were : The Merchants & Mechanics' Insurance Company, the Virginia Fire and Marine Insurance Company, and the Connecticut Fire Insurance Company, and they took the aforesaid amount of \$7,789.98 in equal shares.

A few days afterwards, to wit, on the 28th day of February, 1880, this insurance was accepted and approved by the court, and an order was entered, providing that in case of partial loss by fire, the insurance money should be applied to their restoration; and that in case of total loss, the insurance money should be applied, first, to payment of any back rents that might be due to Douglas H. Gordon; and, second, towards the payment of the Wilson lien.

Subsequently, to wit, on the 21st of April, 1880, the buildings were partially destroyed by fire, whereupon, upon examination, it was discovered that the buildings could be restored for a sum less than the aggregate amount of the three policies taken out by the trustee Dooley.

On the 17th of July, 1880, an order was entered by the district court, authorizing the Merchants and Mechanics' Insurance Company to restore the buildings to as good condition as they were before the fire, and providing, that "upon its doing so, the said company shall be entitled to apply to the cost incurred by it in such reconstruction, the amount for which it is properly liable on its policy, issued to said Dooley, trustee, on said buildings, and also the proceeds of the policies of the other insurers of said buildings, whose policies the said Dooley, trustee, holds; and to enable the company so to do, the said Dooley, trustee, is authorized to pay to it said proceeds, if realized by him, or assign said policies, if remaining unpaid, to said Merchants and Mechanics' Insurance Company, or allow the same, if necessary, to be sued upon by it in his name as trustee, so that the said Merchants and Mechanics' Insurance Company shall, upon so reconstructing said buildings, become entitled to the rights of this court in this cause, and of said Dooley, trustee, in the policies of insurance held by said Dooley, trustee, on said buildings."

Thereupon, the Merchants and Mechanics' Company at once repaired the loss that had been done by the fire, at a cost of \$5,772.57, and then claimed of the Virginia Fire and Marine Insurance Company, and of the Connecticut Fire Insurance Company, each \$1,924.19 as their share of contribution to the loss sustained.

These companies resisted this claim in the court below upon the ground that both the Gordon and the Wilson policies were liable to contribute to the loss, and consequently that the shares for which they (the Virginia Fire and Marine Insurance Company, and the Connecticut Fire Insurance Company) were liable were smaller.

This was the contention of the appellant in the court below and is his contention here. Can it be sustained? Now the doctrine of contribution is not founded on contract, but is bottomed on general principles of justice. It rests upon the principle of natural justice, that where there are several persons bound for the same person and same engagement, that all of them should contribute pro rata to the satisfaction or extinguishment of the common burden, and it has therefore been well said by Mr. Kent in his Commentaries that the doctrine applies very equitably to the case of double insurance, for in such cases the engagements of the insurers are for the same person, on the same subject matter and against the same risks: *Godin vs. London Assurance Company*, 1 Burr., 492; *Ang. on Ins.*, § 26; *May on Ins.*, § 448, et seq.; *Thurston vs. Koch*, 4 Dall., 348;

Newby vs. Reed, 1 Wm. Black, 416, and note. But this doctrine has never been held to apply to other cases of insurance, and it can never have place except where there is an identity of interest, person, and risk: *May on Ins.*, § 436. Such being the well-established rule on the subject, we have only to look to the *Wilson* and *Gordon* policies to see that there is no identity of person or interest. In the case of the *Gordon* policy it is distinctly expressed in the policy that "it is understood that the interest hereby insured consists of a ground rent, amounting to \$1,000 per annum," etc., and in the case of the *Wilson* policies it is patent that they were made for the exclusive benefit of *Wilson's* estate, and that that estate alone had the right to enforce them. It is equally apparent that the interests secured by these policies are separate and distinct from those secured by the policies taken out by *Dooley*, trustee. It may be, as is contended by the appellant, although such does not appear to be the fact from the record, that the appellee, by rebuilding, has relieved itself of all liability under its policy to *Gordon*, but this collateral result cannot operate to fasten upon that company a liability for which it is not bound either by contract or the law in regard to contribution.

I am unable to perceive any ground upon which the contention of the appellant can be sustained, and the decree appealed from must therefore be affirmed.

Decree affirmed.

UNITED STATES CIRCUIT COURT.

DISTRICT OF MASSACHUSETTS.

JAMES E. CROSSLEY

vs.

CONNECTICUT FIRE INS. CO.* }

The policy stipulated that in case of difference of opinion as to the amount of loss, it should be referred to three disinterested men to be chosen, the decision of the majority of whom was to be final and binding.

Held, That the agreement is collateral merely and not a condition precedent to recovery.

Held, That evidence of the amount of loss is admissible though no reference has been had.

GASTON & WHITNEY, and A. FRENCH, *for Plaintiffs*.

G. F. WILLIAMS, W. G. RUSSELL, and J. D. BRYANT, *for Defendant*.

CARPENTER, J.

This is an action at law on a policy of fire insurance. In advance of the trial, and from considerations of convenience, counsel have been heard to argue certain questions which will arise on the trial, in order that they may be provisionally determined. The same questions will also arise in the case of *William L. Reed vs. Fire Insurance Company of Philadelphia*, and counsel therein have also been heard to argue those questions. The policies in question contain the following provisions :—

“In case of any loss or damage the company, within sixty days after the insured shall have submitted a statement as provided in the

* Decision rendered, April 6, 1886.

preceding clause, shall either pay the amount for which it shall be liable or replace the property, etc."

"In case any difference of opinion shall arise as to the amount of loss under this policy, it is mutually agreed that the said loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen, provided that neither party shall be required to choose or accept any person who has served as a referee in any like case within four months; and the decision of a majority of said referees in writing shall be final and binding on the parties."

At the trial of these causes evidence will be offered tending to show the amount of loss under the policy, but such evidence so offered will not consist in any part of the award of referees appointed under the provisions of the clause last quoted. To the introduction of evidence so offered the defendants will object on the ground that the agreement for reference contained in the policy is to be construed to make the award of referees a condition precedent to any proof of amount of loss or to make it the sole evidence as to such amount. When the testimony shall be closed the defendants will pray a ruling that the verdict shall be for the defendants on the ground that the effect of the agreement for reference is to make such a reference a condition precedent to the right of the insured to recover.

Upon these two motions a vital question will be whether the agreement for reference is on the one hand a collateral contract or on the other hand is expressly or by implication a condition precedent to recovery or to any proof of the amount of the loss. Upon examination of authorities I am of opinion that the agreement is a collateral contract only. The questions which I have stated, as well as several other questions which in different views of the case might be material, have been argued very fully and with great skill and learning and abundant citation of authorities. The cases, however, upon which counsel on both sides mainly rely are but few in number. The defendants refer to *Scott vs. Avery*, 5 H. L. Cas., 811. The agreement in that case was "that the sum to be paid by this association to any suffering member for any loss or damage shall in the first instance be ascertained and settled by the committee; and the suffering member if he agrees to accept such sum in full satisfaction of his claim shall be entitled to demand and sue for the same as soon as the amount to be paid has been so ascertained

and settled, but not before, which can only be claimed according to the customary mode of payment in use by the society; and if a difference shall arise between the committee and any suffering member relative to settling any loss or damage * * * in such case the member dissatisfied shall select one arbitrator * * * which three arbitrators, or any two of them, shall decide upon the claims and matters in dispute according to the rule and customs of the club, to be proved upon oath by the secretary." The defendants also refer to *Delaware & Hudson Canal Co. vs. Pennsylvania Coal Co.*, 50 N. Y., 250. In that case the contract was that "in case of an enlargement of the said canal, the said president, managers and company, and their successors and assigns, may also charge and collect an additional toll on coal transported in pursuance of this agreement at a rate per ton of 2,240 pounds to be established after the completion of such enlargement in the manner following, viz: etc."

In these two cases, therefore, it appears that the contract expressly was to pay such a sum as should be fixed by arbitration according to a prescribed plan. The defendants claim, however, that the agreement here is made a condition precedent by a necessary implication. Against this view the respondents cite among other cases, *Dawson vs. Fitzgerald*, L. R. 1 Exch., 257; *Schollenberger vs. Phenix Ins. Co.*, 7 Ins. L. J., 697; *Reed vs. Wash. F. & M. Ins. Co.*, 138 Mass., 532, and cases recently decided by the Supreme Court of Massachusetts and not yet reported in which Clement is plaintiff and certain insurance companies are defendants.

I therefore decide that should the questions to which reference has been made be raised before me in a trial of these cases with a jury I should overrule the objection of the defendants and permit the evidence of amount of loss to go to the jury, and I should overrule the request of the respondents for an instruction to the jury that the plaintiff is not entitled to recover.

SUPREME COURT OF WISCONSIN.

Appeal from Circuit Court, Winnebago County.

SHELDON.

vs.

HECKLA FIRE INS. CO.* }

An agent agreed to insure plaintiff's house, on certain specified terms, in one of the companies represented by him, but not designated, and one of such companies thereupon decided to insure the house upon entirely different terms, and thereafter, before an acceptance of its terms, rejected the risk. *Held*, That there was no contract of insurance.

This action was brought to recover damages for the breach of an alleged contract on the part of the defendant company, entered into by one Bradt, its agent, on November 17, 1884, to insure the dwelling-house of the plaintiff, in Omro, "against loss or damage by fire for the period of three years from said date, in the sum of three hundred dollars, in consideration of which this plaintiff agreed to pay and has paid to said defendant the sum of three dollars and seventy-five cents premium." The dwelling-house was totally destroyed by fire, November 21, 1884. The defendant denies that it made the alleged contract, or received any premium from the plaintiff.

HOUGHTON & HADDOCK, *for Appellant.*

J. H. CARPENTER and FINCH & BARBER, *for Respondent.*

LYON, J.

The controlling question is, did the defendant company contract with the plaintiff to insure his building, as charged in the complaint?

* Opinion filed, March 16, 1886.

The testimony of the plaintiff as to the making of the alleged contract is as follows: "About the 17th of November, I had a conversation with M. G. Bradt about insuring the building. I went to Mr. Bradt and asked him if he wouldn't insure my house. He said he would. I told him I wanted it insured for three years for \$300. He said he would. I asked him how much? \$3.75. * * * He said he would insure it. I told him to make out the policy, and I would pay him for it. * * * He didn't say anything in reference to the payment of the premium." It appears that Bradt was the general agent of the defendant, and also of another fire insurance company; but it does not appear that the plaintiff knew what companies he represented, or even that there was such a company as the defendant, or that anything was said as to the company which was to take the risk. There was some other testimony which tends to show that the agent, Mr. Bradt, waived the immediate payment of the premium. No premium was ever paid to the defendant, but several weeks after the fire the plaintiff offered to pay the premium to Mr. Bradt. The latter refused to receive it, and thereupon the plaintiff left it on the counter in Mr. Bradt's place of business.

Conceding that a contract was made between the plaintiff and Mr. Bradt by which the latter agreed to insure the plaintiff's house in one of the companies represented by him; that it was left to the agent to select the company which should take the risk; that the term of three years and the premium of \$3.75 were agreed upon; and that payment of the premium as a condition precedent to the validity of such contract was waived—still such contract would not be the contract of the defendant, and could not bind it, until the agent should in some manner designate the defendant as the party for whom he contracted. Until that time an action on the contract to insure might with equal propriety have been brought against any other company represented by Mr. Bradt. We have, therefore, this question: Did Mr. Bradt designate the defendant as the company for whom he made the contract to insure plaintiff's buildings? On November 20th, being the day before the house was burned, Bradt made an entry in the register or record of daily reports of the defendant, kept by him, as follows: "No. 81. Henry Sheldon, November 20, 1884, twelve months. Expiration, November 20, 1885. \$300. Rate \$1.25—\$3.75. \$300 on his two-story frame, shingle roof dwelling," etc. This refers to the dwelling which was burned. He also filled up and countersigned a policy of insurance in the defendant company, in accordance with such entries. On the next day

(probably before the fire) he wrote in the same register: "Risk rejected by the company;" also, "Not written up, by order of the company." At the same time he sent the policy to the company. In all this the agent acted on his own judgment, without directions from the company. The plaintiff had no knowledge of the above acts of Mr. Bradt until after his building was burned. Should it be assumed that there was a designation by Bradt of the defendant as the company which should take a risk upon plaintiff's house, there still remains an insurmountable obstacle in the way of a ruling that such designation was effectually made. The entries in the register, and the policy made by Bradt, do not accord with the contract to insure. The company, acting through its agent, has never agreed to insure the plaintiff's house for three years, at a premium of \$1.25 per year. The most it did was to offer to insure the building for one year for \$3.75. That proposition was withdrawn before acceptance, and hence the minds of the parties never met in assent to its terms.

Stated most favorably to the plaintiff, the substance of the transaction is this: Bradt agreed to insure the plaintiff's house on certain specified terms, in some company represented by him, but not designated. The defendant, being one of those companies, decided to insure the house on entirely different terms; but before the plaintiff was informed thereof (and of course before any acceptance) the company determined not to take the risk. That was an end of the matter. No case is cited in which a recovery has been upheld under such circumstances. It necessarily results from these views that the defendant never became a party to the alleged contract to insure plaintiff's house, and hence is not liable in this action. We conclude that the nonsuit was properly ordered.

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF MISSOURI.

FUNK, ADM'R,

vs.

ANGLO-AMERICAN INS. CO.*)

Where a foreign fire insurance company does business in Missouri through an agent, without complying with the requirements of the revised statutes of that State as to the appointment of an agent to receive service of process, process may be served in suits against it upon the agent through whom it transacted its business.

The summons was served upon William A. Noyes, as agent of the defendant, which is a foreign company. The defendant filed an answer containing a general denial, and stating that said Noyes has never had any authority to accept service of any legal process on it, and that there is no agent or person representing it in this State who has authority to accept service. The Revised Statutes of Missouri provide (§ 3,489) that a summons shall be executed, * * * where defendant is a corporation or joint-stock company organized under the laws of any other State or country, and having an office or doing business in this State, by delivering a copy of the writ and petition to any officer or agent of such corporation or company in charge of any office or place of business, or if it have no office or place of business, then to any officer, agent, or employe in any county where such service may be obtained." Said statutes also provide

* Decision rendered, April 22, 1886.—From *Federal Reporter*.

(§ 6,013) that "any insurance company not incorporated by or organized under the laws of this State, desiring to transact any business by any agent or agents in this State, shall first file with the superintendent of the insurance department a written instrument or power of attorney, duly signed and sealed, appointing and authorizing some person, who shall be a resident of this State, to acknowledge or receive service of process, and upon whom process may be served for and in behalf of such company in all proceedings that may be instituted against said company in any other court of this State, or in any court of the United States in this State; and consenting that service of process upon any agent or attorney appointed under the provisions of this section should be taken and held to be as valid as if served upon the company, according to the laws of this or any other State; and such instrument shall furthermore provide that such attorney's authority shall continue until revocation of his appointment is made by such company by filing a similar instrument with said superintendent, whereby another person shall be appointed as such attorney."

GEORGE M. STEWART, *for Plaintiff.*

J. L. & F. P. BLAIR, *for Defendant.*

TREAT, J. (orally).

The amount of loss was in excess of the sum insured. The proofs of the loss were duly made, whereby the amount of the policy, to wit, \$1,100, was payable October 1, 1885. Hence, the only inquiry is as to the sufficiency of the service on the agent Noyes whereby the defendant could be bound. As heretofore held by this court, the contract of insurance was made in this district by said Noyes, as agent of the defendant, and consequently said agent under the rules of law still remained such agent for the purposes of service, unless, possibly, due notice had been given to the plaintiff that he had ceased to be said agent. Where contracts by a foreign insurance company are made in a State without regard to its legal requirements, the company should not be permitted to escape from its liabilities through its non-compliance with the statutory laws of said State. It appears that this policy was formally delivered and premiums collected thereon by the company's agent, W. A. Noyes, within this district; that service in this case was had on said agent Noyes; therefore neither a motion to quash nor a plea in abatement as to service could prevail. The defendant company delivered the contract and collected the premium thereon through its said agent

within this jurisdiction, and it must be held that he continued to be the agent of this company for all the purposes of said contract until the final determination thereof, unless something to the contrary is shown. The fact that he invaded the territorial jurisdiction of Missouri without compliance with its statutory demands cannot excuse him or the company he represented from the obligations of the contract. Were this otherwise, a party would be permitted to take advantage of its own violations of the law to escape its rightful obligations.

Judgment for plaintiff for the sum of \$1,100, with interest at 6 per cent per annum from October 1, 1885, to date, to wit, \$1,136.85.

SUPREME COURT OF NEBRASKA.

Error from Adams County.

EQUITABLE ASSURANCE SOCIETY

vs.

BROBST.*

The plaintiff was employed by a general agent to solicit life risks for the company.

Held, That the company is liable upon the contract made with plaintiff unless he had knowledge of special limitations placed on the authority of the general agent in respect to such employment, if the contract was made in behalf of the company.

The questions concerning such knowledge and as to whether the plaintiff was employed personally by the agent or in behalf of the company are questions for the jury.

R. A. BATTY, *for Plaintiff*.

J. CAPPS, *for Defendant*.

MAXWELL, J.

This action was brought by the defendant in error against the plaintiff, to recover for his services in soliciting risks of life insurance for the society. He states in his petition that he was employed by an agent of the company, and has rendered services of the value of \$350, on which there was a credit of \$25. The insurance company in its answer alleges that W. W. Cramie, with whom the contract was made, "is the agent of the defendant for all of its business of the Northwest; that said W. W. Cramie receives a commission on all of said business coming through his office; that said W. W.

* Opinion filed, January 6, 1886.

Cramie has not, or ever did have, any authority to appoint agents for the defendant. The defendant denies that said plaintiff was ever employed by W. W. Cramie as the agent of the defendant, but alleges the truth to be, that plaintiff was employed as the agent of W. W. Cramie, with the express understanding and agreement that he should have no claim on the defendant." It is also alleged that one E. W. Conner, who assisted the plaintiff below in securing the premiums, was not the agent of the insurance company, but was employed by Cramie. On the trial of the cause the jury returned a verdict for \$325, and interest, in favor of the plaintiff below, and judgment was rendered on the verdict. Exceptions were taken by the insurance company to a number of the instructions given, and for the refusal to give certain instructions; but no reference is made thereto in the brief filed by its attorney, and the errors, if any, will be considered waived. The only question, therefore, for consideration is, does the evidence sustain the verdict?

The testimony tends to show that in February and March, 1882, W. W. Cramie employed the plaintiff below to solicit risks of life insurance, and, in connection with Mr. Conner, who was sent by Mr. Cramie to assist him, policies to a large amount were issued, the first premiums on which amounted to \$2,000 or more, but this money was all paid to Conner, who, it is claimed, sent the same to the company, and that Conner paid the plaintiff below \$25, which is all the compensation he received. All the testimony shows that the plaintiff below rendered the services, and that a fair compensation would be the sum claimed. This, therefore, leaves but two questions for determination, viz.: Was Mr. Cramie the general agent of the insurance company? And, if so, did he, on behalf of the company, employ the plaintiff below?

All the testimony tends to show that Cramie was the general agent of the company. The rule is well settled that the acts of a general agent, with reference to the subject of the agency, will bind his principal, although he may have received private instructions narrowing his authority, unless such instructions are known to the party dealing with him: *Furnas vs. Frankman*, 6 Neb., 429; *Johnson vs. Jones*, 4 Barb., 369; *Bryant vs. Moore*, 26 Me., 84; *Davenport vs. Peoria M. & F. Ins. Co.*, 17 Iowa, 276; *Cross vs. Haskins*, 13 Vt., 536; *Hatch vs. Taylor*, 10 N. H., 538; *Cruzan vs. Smith*, 41 Ind., 288; *Cosgrove vs. Ogden*, 49 N. Y., 255; *Bradford vs. Bush*, 10 Ala., 386; *Hunter vs. Jameson*, 6 Ired., 252.

Whether Cramie had private instructions or not, of which the

plaintiff had notice was a question for the jury; and, having been found in favor of the plaintiff below, the verdict will not be disturbed.

The question as to the special employment of the plaintiff below by Cramie was properly submitted to the jury, and in our view the verdict in that regard is correct.

The claim that the plaintiff below was to render his services for the experience he would acquire in the business is not very plausible nor probable, and it is not surprising that the jury found against it.

It is evident that justice has been done, and the judgment is in all things affirmed.

SUPREME JUDICIAL COURT OF MAINE.

INS. CO. OF NORTH AMERICA

vs.

ROGERS.

Where a marine policy provided, that if on the passage at the end of the term, the risk should continue at pro-rata premium until twenty-four hours after arrival in port, an action by the underwriter will lie to recover such pro rata, though the premium note given for the original premium had already been sued on and gone to judgment.

It is no defense against such action that the insured was only part owner and had overinsurance of his interest in other companies, where the insurance is on the ship, and not simply on the insured's interest, and it does not appear that there was overinsurance of all interests.

WILLIAM E. HOGAN, *for Plaintiff.*

C. W. LARRABEE, *for Defendant.*

LIBBEY, J.

On the 25th of May, 1882, the defendant procured of the plaintiff, insurance on the ship *Levi C. Wade*, valued at \$48,000, in the sum of \$6,500, for one year from April 28, 1882, payable to himself and whom it might concern. The policy contained the usual clause in marine policies as follows : " If on a passage at the end of the term, the risk to continue at pro-rata premium until twenty-four hours after arriving at port of destination, but no longer, either on hull or freight, and in case of loss under this clause, three months' additional premium is warranted by the insured."

The ship sailed from San Francisco April 25, 1883, for Liverpool, and arrived September 18, 1883.

The defendant gave his note for the premium for one year, which

was indorsed by the plaintiff, and judgment recovered on it by the indorsee in 1885.

This action is to recover a pro-rata proportion of premium from April 28, 1883, to September 19, 1883.

By the terms of the policy the defendant was insured during that time for a pro-rata premium, and, accepting the policy with that clause, he must be held as promising to pay the premium. He certainly cannot hold the insurance without promising to pay the consideration for it.

But it is claimed in defense that the defendant owned only twenty-seven sixty-fourths of the ship and had on her a further insurance in another company for the sum of \$16,500, making in all \$23,000, while his interest in the value of the ship was only \$17,250, and that there being an overinsurance of \$5,750, in case of loss he could recover only a ratable proportion of the policies, and therefore is liable for only a ratable proportion of the premium. If this proposition is sound in law, the burden is on the defendant to prove that the policies were simultaneous. This he fails to do. Again, the insurance was on the ship, and not on the defendant's interest only, for the benefit of the defendant and whom it might concern. It does not appear that it was not intended to cover the interest of some other owner, as well as that of the defendant.

Judgment for plaintiff for \$179.50, with interest from date of the writ.

Danforth, Walton, Virgin, Foster, and Haskell, JJ., concurred.

LOWER COURT DECISION.

WHAT CONSTITUTES OCCUPANCY.

Superior Court of Cook County, Illinois.

TRADERS' INS. CO. *vs.* RACE ET AL.

BILL.

AGRICULTURAL INS. CO. *vs.* RACE ET AL.

CROSS-BILL.

The dwelling insured was frequently visited by members of the family for the purpose of looking after the furniture, etc., and generally a servant slept there at night; but no fires were lighted, nor were there any of the usual signs of occupancy.

Held, That this was not an occupancy within the meaning of the policy.

D. J. SCHUYLER, *for Complainant*, Traders' Ins. Co.

ELBERT H. GARY, *for Cross-complainant*, Agricultural Ins. Co.

ROBERT RAE & D. S. PRIDE, *for Defendant*, Race.

SHEPARD, J.

On August 28, 1882, the Traders' Insurance Company and the Agricultural Insurance Company respectively issued a policy of insurance to Sarah Hirsch, whereby each company, in consideration of twenty-eight dollars premium paid by her, insured the said Hirsch against loss by fire to the amount of \$3,500, apportioned as follows:

\$2,500 on her two-story and basement frame dwelling situate on lots 2, 3, 6 and 7 in Irving Park, Cook County, Illinois; \$500 on household furniture * * contained therein; \$500 on frame barn on said premises, for the period of three years.

In July, 1884, Sarah Hirsch sold and conveyed the property in-

sured, together with the land on which the house and barn stood, to the defendant, Francis T. Race. The payment of a part of the purchase price being deferred, a trust deed was executed by Miss Race to Julius Rosenthal to secure the same. Both insurance policies were duly assigned by Mrs. Hirsch to Miss Race, the insurance companies duly consenting thereto, and at the same time the insurance companies, at the request of Rosenthal, attached to each of said policies a contract known as the Chicago Board of Underwriters' form of mortgage clause, making the loss, if any should occur, payable to said Rosenthal as trustee, and containing various agreements, some of which will necessarily be commented upon hereafter.

Question has been raised as to whether the defendant Race knew anything about this mortgage clause, or ever saw it, or heard of it until after the loss by fire occurred.

The evidence shows that she was present in Rosenthal's office at the time of the transfer of the property to her, and the execution by her of the trust deed to Rosenthal to secure the deferred portion of the purchase price, and although she may or may not have fully understood all the details in relation to making the insurance policy an effectual collateral security to her indebtedness, in fulfillment of her covenants in her trust deed to Rosenthal, the fair inference from all the evidence is that she intended to and did in fact assent to the doing by Rosenthal of whatever was necessary to be done concerning the insurance policies, to make the same an effectual and certain indemnity to the beneficiary under the trust deed.

On the evening of May 5, 1885, fire broke out and destroyed the dwelling-house, and a part of the furniture insured.

The Traders' policy contains a clause as follows: "Or if the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, and so remain without notice to, and consent of, this company in writing * * * then and in every such case this policy is void, and all insurance thereunder shall immediately cease and determine."

A kindred clause in the Agricultural policy reads: "If at the time of effecting this insurance any dwelling-house hereby insured shall be unoccupied as a dwelling, and not so stated in the application and the written consent of the company indorsed upon this policy; or, if, without such written consent indorsed hereon, such dwelling-house shall cease to be occupied as a dwelling, then so long as said dwelling-house shall be so unoccupied, this policy shall be void and of no force or effect."

Among the agreements contained in the so-called mortgage clause attached to each policy, it is stated as agreed: "That this insurance as to the interest of the mortgagee or trustee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy," and * * * "It is also agreed, that, whenever this company shall pay the mortgagee or trustee, any sum for loss under this policy, and shall claim that as to the mortgagor or owner, no liability therefore existed, it shall at once and to the extent of such payment be legally subrogated to all the rights of the party to whom such payment shall be made, under any and all securities held by such party for the payment of said debt; but such subrogation shall be in subordination to the claim of said party, for the balance of the debt so secured. Or said company may, at its option, pay the said mortgagee or trustee the whole debt so secured, with all the interest which may have accrued thereon, to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made, an assignment and transfer of said debt, with all securities held by said party for the payment thereof."

Shortly after the loss by fire occurred, the two insurance companies claiming, in apparent good faith, that although liable for the loss to Rosenthal, the trustee named in the mortgage clause, but not liable to Miss Race, the owner of the property insured, paid to Rosenthal, the trustee as aforesaid, the whole debt secured by the trust deed to him—amounting to \$4,840.50—and took from him and his cestui que trust an assignment and transfer to the Traders' Company of the same, and this bill by the Traders Company and the cross-bill by the Agricultural Company, have been filed to foreclose said trust deed.

The insurance companies ground their claim to non-liability to the insured upon that clause in their respective policies in relation to the occupancy of the dwelling in the case of the Agricultural policy, and the occupancy of the premises in the case of the Traders' policy, and the pleadings present the issue of occupancy or non-occupancy.

What is meant by "occupation" of premises insured is a question of law, but whether occupied or not within the meaning of the law is a question of fact.

The authorities concur that where the property insured consists of a dwelling-house, and like provisions, as in their policies, exist

against unoccupancy, then if the dwelling becomes unoccupied and so remains at the time of the fire, the policy thereby becomes avoided: *Ins. Co. vs. Tucker*, 92 Ill., 64.

The Court of Appeals of New York, in the case of *Herman vs. Ins. Co.*, 85 N. Y., has said :—

“For a dwelling-house to be in a state of occupation there must be in it the presence of human beings as at their customary place of abode, not absolutely and uninterruptedly continuous, but that must be the place of usual return and habitual stoppage.”

In that case the destroyed dwelling was the usual summer residence of the plaintiff, was furnished ready for occupancy at any time and was annually resorted to and dwelt in from spring until late in the fall, by the plaintiff and his family as their place of abode, and during the balance of the year was inspected and aired each week by a servant, and members of his family, who lived in an adjacent house on the same grounds, and was visited fortnightly by the plaintiff and his wife in order to see for themselves that it was well taken care of.

Yet it was held that such fell short of occupation, although a useful care and supervision.

Our own supreme court, in *Insurance Co. vs. Padfield*, 78 Ill., 167, has said with reference to a similar condition in an insurance policy :—

“A fair and reasonable construction of the language vacant and unoccupied, is that it should be without an occupant—without any person living in it” * * * not technical occupation, but as popularly understood and used.

With these definitions of what is meant by occupation, and the citations made might be supplemented by many others to the same effect, the inquiry remains to be made as to whether the dwelling-house in the case at bar was occupied at the time of the fire, within the meaning of the policies.

At the time of purchasing the house, the furniture contained in it and covered by the policies of insurance was bought with it and always remained in it, and was rented along with the house to the tenant Frazier. The furniture was in no sense the personal belongings or home surroundings of the defendant, Miss Race. She had never occupied the house as a home, and had never used the furniture in the peculiar sense of use as applied to the furnishings of one's place of personal abode or home. It had been and was to her mere chattel property to lease or sell; so that the fact that the furniture

contained in the house belonged to the defendant, did not of itself in any sense indicate the house as her place of residence, and might as well, so far as the question here presented is concerned, have not been in the house at all. Professor Frazier was the last tenant that occupied the house, and was the only tenant occupying the house subsequent to the purchase by Miss Race.

The evidence discloses that some time in the latter part of December, 1884, while Professor Frazier was absent from home, his wife abandoned the house and him, taking along with her their children and some of their own furniture, and that after that time neither he nor she, nor any of their family, ever returned to the house to live in it. Although not very clear as to that, I think it may fairly be inferred from all the evidence that it was not until in March following that Frazier fully abandoned all expectation of re-uniting his family in the same house as their usual home once more, and that from shortly after his wife left, and so long as the half ton of coal, more or less, left in the house lasted, Mr. Richard Race, at the request of Frazier, had a fire maintained in the house, and that for a short time a man servant of the Race family occasionally slept in the house for purposes of protection.

It is undeniable, however, that a time did come prior to the beginning of April, when, for a good many days, if not weeks, the house was unquestionably unoccupied, and that if a fire and consequent loss had then occurred, no fair pretense of occupancy could or would have been asserted by the defendant.

There was, then, one time and that in or about the month of March, during which, though the most favorable construction admitted of by the terms of either policy be given to the assured, the insurance would have been suspended; and now the inquiry proceeds to ascertain if any such change in occupancy thereafter occurred, which should cause the insurance to again attach.

It has been argued by counsel for the Traders' Insurance Company, that the language of its policy providing that if the premises become "unoccupied and so remain without notice to and consent of this company in writing, * * then * * this policy is void, and all insurance thereunder shall immediately cease and determine," precludes the insured from claiming that the insurance was merely suspended during the period of unoccupancy, and that upon a removal of the interdicted condition of things it again attached, but that, on the contrary, the contract of insurance thereupon ipso facto terminated, and could be revived only by a new agreement.

The language used is certainly very strong, and if not limited by any other provisions of the contract, would bear the construction contended for, and if found to be necessary as I proceed in considering the case, I shall recur to it.

The Agricultural policy by its terms provides for a suspension of insurance during a period of interdiction, and for a re-attaching thereafter.

The discrepancies or contradictions between the testimony of the several witnesses for the complainants and the testimony on the part of the defense, on the question of occupancy for the month preceding the fire, are more apparent than real. When one comes to a careful examination of the testimony of the witnesses introduced by the defendant, it will be seen that the kind of occupancy sought to be made to appear therefrom is such as well comports with the truth of the testimony of complainant's witnesses, that there was no such occupancy as was visible to the neighbors or passers by. No fires were lighted in the house from the time the professor's coal gave out up to the very afternoon of the occurrence of the loss, a period of some months, and it is not to be believed that the man servant or Mr. Richard Race, who occasionally slept in the house, would indulge very liberally in the odor of the midnight lamp, during the months of winter and early spring, in this climate, inside a house devoid of artificial heat. A lady witness I believe testified to hours of reading from the professor's well-stored library, both by day and lamp-light, while caring for and occupying the house, but she must have been engaged on works of the imagination, which the professor as a popular lecturer doubtless surrounded himself with.

Therefore, accepting the testimony of complainant's witnesses as true that never observed smoke coming from chimneys, lights from windows, or any person going in or out of the house, or any other of the usual signs of habitancy, from the time of Professor Frazier's leaving the house down to the night of the fire, I am also disposed to give full credit to the testimony in behalf of the defendant, in so far as it establishes the fact that from and after the early part of April, down to the day of the fire, the ladies and other members of the Race family frequently, if not daily, visited the house, and engaged themselves and others in airing and renovating its interior, in the work of sodding, transplanting and otherwise embellishing the surrounding grounds, and that as a general thing either the man servant or Mr. Richard Race slept in the house at night; that on the afternoon preceding the night of the fire, and during

the evening, fires in various rooms were kindled, and lamps lighted in order to make the house comfortable and its furniture attractive to persons who might come to view, and perhaps purchase such of the furniture, as it was resolved to sell prior to the incoming of Mr. Ulybourne, the gentleman who had leased the house and expected to take early possession.

And these facts are, as I have understood the witnesses, substantially all the facts relied on by the defendant, to establish an occupancy of the house within the meaning of the policies, except the further fact of the occupancy of the barn, by the servant of a tenant who rented and used it for stable purposes, which, it has been argued, on the theory that the contract was an entire one, saved the insurance against the condition as to non-occupancy.

Whether this argument be applied to the condition of the Traders policy, wherein the words "above-mentioned premises," are used, or to that of the Agricultural policy, wherein the words "such dwelling house" are employed, I think it must not prevail.

To hold that the words "above-mentioned premises" refer and apply collectively to all the property described where there is a specific amount of insurance on each, notwithstanding the premium is expressed in a total sum and not apportioned on each specific thing insured, would be to involve an insurance policy in a mass of absurdities.

A barn is occupied when it is used for the purposes for which it was built, for stable and carriage purposes, and for the storage of such articles as are necessary for the proper sustenance and protection of animals and vehicles.

The addition to such occupancy of a person in charge thereof does not render the occupation any more complete.

We should therefore have to hold that the moral hazard which in insurance attains the minimum when a dwelling-house, the usual abode of the family with all the securities and sanctities surrounding a home is at risk, would be fully met by an empty house with a stable full of horses a few hundred feet away. Such a conclusion would set reason at defiance.

As to the house itself I do not think the occupancy proven was such an occupancy as the law requires in order to save the condition of either one of the two policies.

The visits of the various members of the Race family to the premises and the sleeping therein by the hired man or Mr. Richard Race, as testified to, may have served a useful purpose as a pro-

tection against marauders or burglars, and even as a prevention of fire, but neither one nor both were sufficient.

Neither the contract of insurance nor the intent of it was met by the kind of occupation employed by the defendant.

The contract was for one kind of occupancy. If that ceased the assured had most ample time in which to protect herself, but not availing herself of her opportunities the insurer should not be called upon to suffer on account of her delinquencies.

The case of *Ins. Co. vs. Tucker*, 92 Ill., 64, does not in any way conflict with this conclusion. There the occupation of the owner had never ceased. His family had gone, but he still remained, without intention of leaving until his tenant arrived, and although absent from the house at the hour of the fire his intention was to return, and in contemplation of law his occupancy was as complete as at any time.

In the case at bar both a living in the house and the *animus nontendi* as to a customary place of abode were wholly lacking. The house in question was visited and at night stayed in for a special purpose—that of watching it—and not for the general, and usual purpose of abode or dwelling in.

THE INSURANCE LAW JOURNAL.

VOL. XV.

SEPTEMBER, 1886.

No. 9

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF MICHIGAN.

Error to Wayne.

NORTHWESTERN TRANSPORTATION CO. }

vs.

THAMES & MERSEY INS. CO.* }

A policy of marine insurance contained this provision: "In case of loss or misfortune, it shall be lawful and necessary to and for the assured, its agents, factors, servants and assigns, to give the insurer prompt notice of the disaster, and submit the plan adopted for recovering and saving the property, and to make all reasonable exertion in and about the defense, safeguard, and recovery of the said vessel, or any part thereof, without prejudice to this insurance; and after recovery, and the holding of a survey by persons chosen by the insurer and insured, or their agents, made under oath, setting forth the particulars of actual damage received by the

* Opinion filed, January 29, 1886.—From *N. W. Reporter*.

vessel in the disaster, and discriminating between those and former defects, and wear and tear, the insured are to cause the same to be forthwith repaired, in accordance with the surveyor's specifications; and in case of neglect or refusal on the part of the insured, its agents or assigns, to adopt prompt and efficient measures for the safeguard and recovery thereof, or to repair the same when recovered, then the said insurers may, and are hereby authorized to, interpose and recover the said vessel, or, after recovery, to cause the same to be repaired, or both, for account of the assured." *Held*, That in an action against the insurer the neglect of the defendant to cause the repairs to be made was evidence upon which the jury are at liberty to find an acceptance by the defendant of the abandonment; the facts being that after a disaster the assured had left the vessel stranded, and after having had it surveyed notified the insurers of their having abandoned it, whereupon the insurers, after neglecting said vessel for several months, towed it into port, and, without repairing, left it there.

MOORE & CANFIELD, for Plaintiff.

MATNARD & SWAN, for Defendant and Appellant.

CHAMPLIN, J.

Plaintiff brought an action upon a policy of marine insurance, issued by the defendant upon the steamer *Manitoba*, whereby the plaintiff, as owner, was insured in the sum of \$7,500, against total loss and general average only. The steamer was valued in the policy at \$36,000. She was also insured by the Insurance Company of the State of Pennsylvania in the sum of \$3,350; by the Continental Insurance Company, \$10,000; and by the Union Insurance Company in the sum of \$10,000,—leaving \$5,150 at owner's risk. On the sixth of November, 1883, the policies being then in force, the steamer left the port of Port Arthur, on Lake Superior, bound for Sarnia, Ontario. She reached Southampton, on Lake Huron, November 11th. The wind was then blowing from the southwest. Soon after her arrival at Southampton, and while she was moored alongside the breakwater, the wind suddenly veered to the northwest, and came down in a terrific gale, and increased to a hurricane, which caused the steamer to part her moorings and drift into the harbor. Both her anchors were dropped, and the cable of the small anchor parted. Her large anchor, with full scope of chain, was not able to hold her, and she drifted away to leeward. About 4 o'clock the next morning her large anchor chain parted. She was then run inside the breakwater, and, to save her from going ashore, her large hawser was gotten out to a snubbing-post, which, however, snapped and was carried away at once. Lines were then gotten out on her starboard side forward, which held her for a time, when a terrific blast from the northwest struck her with such force as to part her lines, and, fearing that she would be driven upon a lee shore and totally lost, her master voluntarily stranded her on the shore of

Chantry Island, near the mouth of the harbor. The storm continued with little intermission for about eight days, causing the steamer to roll and pound upon the rocks at the place where she was stranded, and to spring a leak; and, to prevent greater damage, the sea-cocks were opened, the steamer was allowed to fill, and settle upon bottom. After the steamer was thus voluntarily stranded, her passengers, to the number of sixteen, were taken ashore. She was without cargo except 160 barrels of salt fish, which were landed about the same time at Southampton. Efforts were made as promptly as possible by the plaintiff to rescue and care for the steamer, and considerable expense was incurred in such undertaking, but without success. The underwriters were promptly notified of the disaster, and sent wrecking tugs to her assistance. Subsequently, through their general agents, Crosby & Dimick, of Buffalo, they sent Captain Rardon, as wreck-master, to take charge of the operation: for the rescue of the steamer. Upon his arrival Rardon, as agent of the insurers, took possession of the steamer, and assumed exclusive control of the wrecking operations. He continued his efforts to release the steamer, without success, until November 27th, when he received instructions from the insurance companies to go to the rescue of the propeller *Enterprise*, then stranded at Green Island, which was also insured by the same underwriters, or one of them. In pursuance of these instructions, Rardon, as the plaintiff claims, placed a couple of watchmen in charge of the *Manitoba*, and went to the *Enterprise*, taking with him the wrecking tugs, steam-pumps, and other wrecking apparatus which had been employed at the *Manitoba*. On November 27th, before going to the *Enterprise*, Rardon informed Mr. Beatty, the president of the plaintiff corporation, that he had concluded to leave the *Manitoba*, and "let her lie there until spring." Mr. Beatty protested against this being done, and notified Rardon that the plaintiff was ready to pay its proportion of the expense of taking the *Manitoba* off, and that if she was not gotten off immediately he would abandon her to the insurance companies; adding that "leaving her there until spring means total loss." On the next day Dimick, one of the general agents of the defendant, was telegraphed: "If no answer about getting *Manitoba* off, Beatty will abandon her to the insurance companies to-morrow morning." This dispatch was sent through A. H. Dalziel, who was the insurance agent at Sarnia, who effected the insurance on the vessel, acting on behalf of defendants' agents at Buffalo. Other telegrams of a similar nature were sent to the gen-

eral agents at Buffalo. Notwithstanding the protests and objections of the plaintiff, the underwriters ceased their efforts to release the steamer, and suffered her to remain where she was stranded until the latter part of May or the first of June following. On the thirteenth of December, 1883, the plaintiff, through its president, sent to each of the insurance companies interested a notice of abandonment. That sent to the defendant was as follows:—

SARNIA, December 13, 1883.

To the Thames & Mersey Insurance Company: The steamer *Manitoba*, of the Northwest Transportation Company, limited, was insured in your company in May last, against total loss and general average, fire clause exempted. She had to be beached in the harbor of Southampton during the storm of the eleventh and twelfth of November, or on the morning of the 12th, and still remains there, during which time efforts have been made to take her off, without success. Before Mr. Rardon, your general agent, left for another wreck, he advised me of his intention to leave the steamer *Manitoba* there until spring. To this I gave my distinct refusal, stating that she must be got off this fall, and that I was prepared to pay my proportion of the expenses. An offer was obtained from Mr. Murphy, of Detroit, that he would furnish a complete outfit for taking the steamer off for \$500 per day, or \$10,000, under a guaranty to take her off or no pay, which offer was refused by your agent. He ordered the steamer laid up, in opposition to my instructions to proceed and take the steamer off. Regarding her as a wreck, I accordingly abandoned her to the insurance companies' agent, and now notify you that I have abandoned the steamer *Manitoba* to you.

Yours, truly,

JAMES H. BEATTY.

(President Northwest Transportation Company, Limited.)

v. 26 N. W., no. 4—22

No attention was given or reply made to this notice. In April following the defendants made a contract with a Mr. Murphy to rescue the steamer, and he started from Detroit about the ninth of May, and as early in the season as the ice would permit, and he got the steamer off about the last of May or first of June, and brought her to Detroit in a wrecked and damaged condition, and placed in dry-dock, where she was permitted to remain for several days without any one giving any instructions to the dry-dock company about making repairs. The president of the company then served upon the defendants the following notice:—

To the Thames & Mersey Insurance Company: We are advised that the steamer *Manitoba* is in the Detroit dry-dock, at Detroit, where she was placed by her insurers, and that no repairs are being made upon her, and that charges and expenses are running up against her without any benefit to her.

We therefore desire you to take notice that we shall insist upon abandonment of the steamer to her insurers as heretofore made, as a constructive total loss. For the purpose of saving increased expenses without profit, we will put said steamer in such condition as will prevent her from sinking, and remove her from the dry-dock, and hold her subject to the order of the insurers, and at their risk; and, further, we demand of you payment of the amount insured upon said steamer by your policy number 329.

Yours,

JAMES H. BEATTY,
Manager Northwest Transportation Company,
Per JOHN D. BEATTY.

The notice was served by delivering the same to the general agents of defendant, in Buffalo, who then gave their permission that Mr. Beatty should have certain repairs made, and thereupon Mr. Beatty directed those repairs to be made, which appear to have been merely of a temporary nature, and for the purpose of keeping the steamer afloat. While she lay in dry-dock a survey was held by surveyors mutually chosen by the parties, who estimated the costs of the repairs at \$8,391.39. The cost of survey was \$50. Subsequently, and by mutual agreement, W. D. Robinson, of Buffalo, was chosen as an adjuster to adjust the expenses made necessary by the disaster, who made a statement of the matters referred to him, and reported, over his signature, on June 23, 1884, a copy of which was given to the underwriters and a copy was given to the insured. By the adjustment as made by Mr. Robinson it appears that the entire expense incurred for salving and repairing the steamer was \$25,124.07. The correctness of this adjustment is not conceded by the defendant, and the items going to make up the amount which should be chargeable under a claim of abandonment as for a total loss form one of the main subjects of contention in the case.

The jury also found specially that Captain Rardon went, as agent of defendant, to the *Manitoba* while she was stranded, and took possession of her, and assumed charge of the operations undertaken in November to get the steamer off, and that, as agent of the insurers, left said steamer, and caused her to be laid up at the place where she was stranded, against the objection and protest of the owners; that the steamer could have been gotten off in November or December so as to be repaired for the next season's business if the insurance company had exercised due diligence; and that Rardon, as agent for the insurance company, did not exercise proper diligence in getting the steamer off. They further said that they were unable to say at what cost the damage and injuries done to the steamer

Manitoba by the voluntary stranding of the steamer, and consequent upon such stranding, could have been repaired, excluding the cost of floating and releasing the steamer, which they found to be \$5,000, including the bringing her to Detroit. They further said they did not know what amount of money the insurers of the steamer were liable to pay under an adjustment as of a partial loss by reason of the stranding of said steamer under the evidence in the cause. They found as a fact that the plaintiff did abandon, in writing, the steamer *Manitoba*. They found, also, that the plaintiff, or its assistant manager, did not instruct J. J. Rardon, in April, 1884, that said steamer would have to go to Detroit for repairs and dockage, and was not brought there pursuant to such instructions. They also found, in answer to defendants' question that it was not practicable for plaintiff to effect the floating and release of the steamer *Manitoba*, in November, 1883, or in December, 1883, after the suspension of Rardon's efforts by the use of the customary appliances for that purpose. They said they did not know what the expense was of wages and provisions of the crew of the *Manitoba* during the detention and stranding of the steamer in November, 1883; and they found that the charge made in the adjustment for lay days for the steamer in the dry-dock, up to June, awaiting instructions, of \$586.88, is not included in the amount required to make a constructive total loss.

After the repairs mentioned, which, as before stated, were merely sufficient to keep the steamer afloat, the defendant, without having caused the steamer to be repaired in accordance with the survey, or having tendered the amount found by the surveyors to be necessary to restore her to her former condition, tendered her back to plaintiff while she was lying at the dock at Detroit, in her wrecked and damaged condition, and the plaintiff refused to accept her. It was admitted that the *Manitoba* was libeled and seized by the admiralty court for the eastern district of Michigan, for the bill of the Detroit Dry-dock Company for docking and temporary repairs of the steamer, occasioned by the stranding; that a decree was taken against her for said claim, under which she was subsequently sold.

The court instructed the jury as follows:—

“The complainant claims that in this case there was a constructive total loss, that the expenses alluded to exceeded 50 per cent, and therefore they had the right, as a matter of law, to claim a constructive total loss. Now, the theory of the defense is—First, that there was no legal abandonment, or right of abandonment. They say that the notice was not a legal notice. The court will charge

you here that, in its judgment, it was a legal notice. They say that the complainant did not have the right, under the circumstances of the claim and abandonment, to claim the constructive total loss; second, that the expenses claimed by the complainant are not recoverable by the terms of the policy; and third, that the acts of the defendant in regard to the vessel did not, under the policy, compel them to go on and repair the vessel. I think that the letter of December 13, 1883, is a sufficient abandonment, taken in connection with other things. They had the right to do it, and they did exercise that right. I charge you, gentlemen of the jury, that if you believe the evidence of the complainant—and you are judges of that evidence—if you believe the evidence of the complainant, then you will be justified in finding—First, that there was an abandonment by the complainant to the defendant of the said vessel, and an acceptance by the defendant of the abandonment; and the complainant would be entitled to recover, if you believe their testimony, as for a constructive total loss—if you believe the defendant did not use reasonable diligence in raising and rescuing the steamer, and also that the expenses exceeded 50 per cent—and your verdict would be \$7,769; that is the amount, with interest added, if it is correct. You have the right to compute it yourself. If they are correct, the amount is \$7,769, that being the amount insured by the terms of the policy; but if you do not find that there was an abandonment and acceptance—that depends upon your belief of the testimony as to whether you are justified in finding it—but if you do not find that there was an abandonment and acceptance, and the expenses were less than 50 per cent, then your verdict would be for a partial loss, and, as I understand the counsel, they will then agree among themselves to refer to some one to determine details; but in making up your minds, gentlemen, on the general question, you may consider the testimony of Mr. Beatty, the complainant's president. He testified, in substance, that a year after the disaster, in September, 1884, and after the steamer had been brought to Detroit, he had an interview with the general agent of the defendant at their office in Buffalo concerning the matter; that the adjustment paper, which you have already seen produced here, was before them; that this paper was prepared by Mr. Robinson, by mutual consent between the company and the complainant, and that he did make an adjustment in their behalf; that this paper was present, and that it showed the amount of the loss claimed, as the defendants have argued; that no objections were made by them to the amount as stated in that ad-

justment; that the only question with them was that they did not agree with certain points decided by Mr. Justice Matthews, and desired the supreme court to pass upon those questions. I call your attention to that, gentlemen, as bearing upon the question how far the defendant objected to this account as to the claims made by the complainant. I say, gentlemen, if you believe the testimony of the complainant, and find an abandonment by them, and an acceptance by the defendant, the complainants are entitled to a verdict. If you do not believe it, your verdict will be for a partial loss, and counsel themselves will determine as to the amount in some other way."

From what has been said it is apparent that the main point in controversy is whether the jury were justified from the evidence in finding that the abandonment of the vessel was accepted by the defendant. The court instructed them that if they found an abandonment by the plaintiff, and an acceptance by the defendant, the plaintiff was entitled to their verdict. They did find, in answer to a question submitted to them by the defendant, that the plaintiff abandoned the steamer *Manitoba* to the defendant, and they also found a general verdict for the full amount of insurance covered by the policy, and consequently must have found that the defendant accepted the abandonment. Upon no other theory can their verdict be sustained. Without proof of abandonment and acceptance, it was incumbent upon the plaintiff to prove abandonment, and that the amount of loss or damage adjusted under the terms of the policy equaled or exceeded one-half of the value of the vessel as stated in the policy, and in this case equaled or exceeded \$18,000. It would therefore have been necessary for them to answer the first and fourth questions submitted by the counsel for defendant, namely: "First. At what cost could the damage and injuries done to the steamer *Manitoba* by the voluntary stranding of said steamer, and consequent upon such stranding, have been repaired, excluding the cost of floating and releasing said steamer?" "Fourth. What amount of money were the insurers of the steamer *Manitoba* liable to pay under an adjustment as of a partial loss, by reason of the stranding of said steamer *Manitoba* under the evidence in this cause?" To the first question they answered, "Unable to say;" and to the fourth, "Don't know." In case the jury had not found that there was an abandonment, and acceptance thereof, they were not justified in finding a verdict for the plaintiff without being able to answer these two questions.

In the case of *Orrok vs. Commonwealth Ins. Co.*, 21 Pick., 456, in which it was claimed there was a constructive total loss, the trial judge, of his own motion, directed the jury to make a special finding as follows: "The court desires the jury, if they find for a total loss, to state the items of damage which, in their opinion, exceed one-half the sum insured." On review in the supreme court it was said: "We do not think there was anything wrong or irregular in that instruction. In civil proceedings the law and the fact should be kept as distinct as possible, to the end that the law may be practically what it professes to be—a uniform rule of action."

In cases of this character, where items which are disputed go to make up an aggregate amount, and the rights of the parties depend upon the amount established, it becomes important to know what items are included by the jury in the total found by them, and in this case, if the right to a recovery as for a total loss depended upon the amount, it was material and important that the jury should find what the amount was that went to make up the total loss; but if the jury found, as they appear to have done in this case, that the steamer had been abandoned and accepted, then it became of no sort of consequence whether the total loss exceeded 50 per cent of the value of the vessel or not. The vessel was stranded, and in an exposed place, where she would be compelled to remain from five to six months, exposed to the action of the storms and ice, resulting in damage to the vessel that necessitated extensive and costly repairs, and she was in a position where a prudent owner might well apprehend that leaving her there during the winter meant a total loss. An abandonment made under these circumstances, and accepted by the insurers, was sufficient to fix the liability of the company as for a constructive total loss, even though the damage should afterwards be found to fall short of the requisite amounts. After abandonment and acceptance it is too late for either party to recede. The title passes to the insurer, and he becomes the owner. If the loss turns out to be less than 50 per cent, that fact does not operate to re-transfer the title, or give to the insurer the right to surrender or tender the vessel to the assured.

The plaintiff argued before us that the facts in the case showed an actual total loss; but as the steamer was rescued, and taken into the port of Detroit, no attention need be paid to this branch of the argument.

The policy upon the subject of abandonment reads as follows: "It is agreed that the acts of the insured, or insurers or their

agents, in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered a waiver or an acceptance of an abandonment, nor as affirming or denying any liability under this policy; but such acts shall be considered as done for the benefit of all concerned, and without prejudice to the rights of either party. Further, the insured shall not have a right to abandon the vessel, in any case, unless the amount which the insurers would be liable to pay under an adjustment, as of a partial loss, shall exceed half the amount insured; nor shall detention, by the season, or by any other cause, be alleged or allowed as cause for abandonment. Moreover, no abandonment, in any case whatever, and even when the right to abandon may exist, shall be held or allowed as effectual or valid, unless it shall be in writing, signed by the insured, and delivered to the said company, or to their authorized agents; nor unless it shall be efficient, if accepted, to convey to and to vest in the said insurance company an unincumbered and perfect title to the subject abandoned; and the valuation of said vessel, expressed in this policy, shall be considered the value in adjusting losses covered by this policy." Under this clause of the policy, it is contended, on behalf of the defendant, that, to entitle the plaintiff to recover for a technical or constructive total loss, he must establish by proof one of the following propositions: "(1) Loss of the required character and amount, followed by an abandonment in compliance with the contract, or a waiver thereof; or (2) a loss, even if sufficient in amount, which was followed by an abandonment, accepted in fact;" that is, I suppose the counsel means by "accepted in fact" an express acceptance; "or (3) a loss, whatever its amount, followed by an abandonment to which the law attaches an acceptance because of action or inaction on the part of the insurer, to the detriment of the insured."

The third ground stated is the only one that concerns us under the evidence as disclosed by the record, the charge of the court, and the verdict of the jury. By the well-established principles of marine insurance a deed of abandonment is not essential to the rights of either party, as the title passes, and the property vests, in the insurer immediately on abandonment: *Chesapeake Ins. Co. vs. Stark*, 6 Cranch, 268; *Lee. Ins.*, 486; *Phil. Ins.*, § 1,693. No particular form is necessary, and, unless required by the policy, it need not be in writing: *Patapasco Ins. Co. vs. Southgate*, 5 Pet., 604; *Bell vs. Beveridge*, 4 Dall., 272; *Heebner vs. Insurance Co.*, 10 Gray, 139.

Under the policy in question all that is requisite is that it must

be in writing, signed by the insured, and be efficient, if accepted, to convey to and vest in the insurance company an unincumbered and perfect title to the *Manitoba*, and be delivered to the defendant or its authorized agent. The paper writing dated December 13, 1884, addressed to defendant, and signed by the president of the company, and transmitted to the defendant's agent, I consider a sufficient compliance with the terms of the policy, especially if the defendant is held to have accepted the abandonment; for an act of abandonment, when accepted, has all the effects which the most full and accurate assignment could accomplish: *Comegys vs. Vasse*, 1 Pet., 193.

Three objections are urged against the sufficiency of the above-mentioned writing: (1) That it states no sufficient cause for abandonment; (2) it does not comply with the terms of the act of parliament of Great Britain, entitled "An act to amend and consolidate the acts relating to merchant shipping," on the subject of "transfers and transmissions," which requires that registered ships, or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale, and such bill of sale shall contain such description of the ship as is contained in the certificate of the surveyor, or such other description as shall be sufficient to identify the ship, to the satisfaction of the registrar, and shall be according to the form marked "E" in the schedule hereto, or as near thereto as circumstances may permit, and shall be executed by the transfer in the presence of and be attested by one or more witnesses; (3) the steamer was incumbered at the time with a mortgage running to the president of the corporation owners in the sum of \$64,000, which was then undischarged.

I think the first point untenable. The cause for abandonment is sufficiently stated.

Neither do we think the second objection is well taken. There is nothing in the statutes of 17 and 18 Vict., c. 104, § 55, above quoted, which indicates that an abandonment such as that under consideration would not vest in the insurers, when accepted by them, an efficient title to the property abandoned. Indeed, I do not think the statute refers to cases of transfer by abandonment. Here were three other companies besides the defendant to whom abandonment was made. What propriety is there in claiming that defendant was entitled to a bill of sale under the merchants' shipping act? See *Phil. Ins.*, § 1,722. It was held by Bramwell, L. J., and Brett, L. J., in the case of the *Union Bank of London vs. Lenan-*

ton, 3 C. P. Div., 243, s. c. 47 L. J. C. P. Div., 409, that a transfer of a ship which had not been registered as a British ship under section 19 of the merchants' shipping act of 1854 was good, although not made by bill of sale under section 55. No reference is made to the act in the policy, and as the contract of insurance was entered into in Buffalo, in the State of New York, I hardly see how it can be affected or controlled by the act of parliament above quoted.

Upon the third point I agree with the circuit judge, that the execution of the paper of date December 13, 1883, by Mr. Beatty, who was at the same time mortgagee, operated as a discharge of his mortgage by way of estoppel. The policy required the plaintiff's abandonment to be in writing, and that it should be efficient, if accepted, to convey to and vest in the insurance company an unincumbered and perfect title to the subject abandoned. The intention plainly appears, upon the face of the paper, to abandon, and Mr. Beatty, in executing the paper on behalf of the company, must have intended that such abandonment should be effectual and that the insurance company would act upon it. When they did act upon it, and accept the abandonment, he was thereby precluded from ever afterwards asserting an interest in the property antagonistic to that which was conveyed by the abandonment and acceptance: *Northwestern Transp. Co. vs. Continental Ins. Co.*, 24 Fed. Rep., 171; *Hayes vs. Livingston*, 34 Mich., 387, and cases there cited; *Pratt vs. Maynard*, 116 Mass., 388; *Stafford vs. Whitcomb*, 8 Allen, 518; *Roberts vs. Crawford*, 54 N. H., 532; *Gage vs. Whittier*, 17 N. H., 312; *Patrick vs. Meserve*, 18 N. H., 300. He did, however, upon the trial, make out and tender a formal discharge of the mortgage for a nominal consideration, in confirmation of the abandonment. I do not see how this could affect the merits of the question under the terms of the policy, as the abandonment must have been efficient to convey an unincumbered title before it was accepted; and while acceptance might be held to be a waiver of defects and irregularities in the abandonment, it could not be held to extend to a waiver of the right, secured by the contract, of an unincumbered title to the property, especially as the defendants were ignorant of the existence of such incumbrances until served with proofs of loss in 1884.

I think the abandonment was properly made and sufficiently proved. Was there an acceptance of the abandonment? Nothing was said by the defendants' agents or officers, either accepting or rejecting the abandonment made by the plaintiff. It is claimed,

however, that under the facts and circumstances, by their acts in the premises subsequently to the abandonment, the defendants have accepted it. These acts consist in taking possession for the purpose of rescuing and retaining possession of the steamer, and neglecting to effect the rescue until about June, 1884, more than six months after the disaster, and then recovering her, and taking her to the port of Detroit, where the defendant neglected to cause repairs to be made, or to tender the amount found necessary by the survey to put her in repair. The plaintiff contends that it was the duty of the defendant, after taking possession for the purpose of recovering the vessel, to proceed with due diligence, and without unreasonable delay, to recover and repair the steamer, and that by reason of its negligence in that respect it has precluded itself from denying that it has accepted the abandonment, and from its action and negligence acceptance will be inferred. On the contrary, the defendant's contention is that, by the terms of the contract between it and the plaintiff, "it was agreed that the acts of the insured or insurers, or their agents, in recovering, saving, and preserving the property insured in case of disaster, shall not be considered a waiver, or an acceptance of an abandonment, nor as affirming or denying any liability under this policy; but such acts shall be considered as done for the benefit of all concerned, without prejudice to the rights of either party;" and therefore nothing can be predicated upon the acts of the defendant in recovering and preserving the property insured, as affecting the question of acceptance of the abandonment, and that acceptance cannot be inferred, or implied from the silence of the company in reference to the abandonment.

This clause of the contract is for the benefit of all concerned. Its object doubtless is to do away with the rule of law formerly prevailing, which held that in case of abandonment, if the insurer interfered to recover or preserve the property, such act was an acceptance of the abandonment. It will be observed that this clause has reference to an abandonment previously made, and has no application to the efforts of either party before an abandonment is made. Whatever is done towards recovering a vessel lost by stranding, previous to abandonment, is done in the interest of the owner, and is governed by the same principles of salvage, whether done by the insurer or by other persons. No contract was necessary to protect the rights of parties in such case. It might happen, however, that while the insurer was engaged in an effort to rescue the vessel, the owner might give notice of abandonment, and then the insurer must, under the

old rule, desist, at the peril of being held to have accepted the abandonment. Under the clause in question he runs no such risk, and may continue his exertions to rescue the property, and prosecute them to a successful termination, if possible. I do not think, however, that the privilege continues indefinitely, or to a case where the insurer, after attempting a recovery, discontinues or suspends operations for the recovery of the vessel. It seems to me clear that the case would be different if, after notice of abandonment, and after suspension of previous efforts and considerable delay, the insurer proceeded to take possession of the property for the purpose of rescuing and recovering it. In the former case such acts are to be considered as having been done for the benefit of all concerned. In the latter case, as well as where he proceeds for the first time to recover the property after abandonment, such acts would signify an acceptance of the abandonment, and that the insurer was acting in the character of owner; and especially would this be so when the insurer had preserved silence in reference to the abandonment, and had neither denied the right to abandon or give notice of a refusal to accept. The rights of the respective parties, as well as good faith and fair dealing, requires such construction to be placed upon the contract: *Kaltenbach vs. MacKenzie*, 3 C. P. Div., 479, 480, per Colton, L. J. The owner, from the time a legal abandonment is made, ceases to have any right or interest in the property, which then becomes vested in the insurer; and, while it remains incumbent upon the insured to show the facts which gave him the right to abandon he may relieve himself from that burden by showing acceptance either express or implied, by the insurer. Whatever was done by the defendant in November, 1883, in attempting the rescue of the steamer *Manikba*, has no bearing upon the question of abandonment under this clause of the policy, because no abandonment was attempted by the owner until those efforts were suspended, and had virtually ceased. Afterwards came the notice of December 13, 1883, to which the defendants returned no reply. Nothing was done until the following May, when the defendant sent Mr. Murphy to the scene of the disaster, who recovered the steamer, and brought her to the port of Detroit about the first of June, 1884. Now, in what capacity was the defendant acting when it sent Murphy to recover the steamer, and bring her to Detroit? Was it acting as owner, or merely as salvor for the benefit of all concerned? The intent with which they acted has much to do with the question of acceptance: *Reynolds vs. Ocean Ins. Co.*, 22 Pick., 191.

If they intended to act as owners, it was an acceptance; but if they merely intended to rescue the steamer, and cause her to be repaired, and thus indemnify the owners, it would not be an acceptance, and the plaintiff would be obliged to prove facts which entitled it to abandon, before it could recover for a constructive total loss; so that the act in itself may be said to be ambiguous, and in such a case, looking to this act merely as evidence of abandonment, I think the jury would have the right to construe the act most strongly against the defendant, for the reason that its interest was a matter entirely within its own knowledge, and by speaking it had the power to solve all doubts and dispel all ambiguities, and, although no duty rested upon it to say whether it accepted the abandonment or not, so long as it was both silent and inactive, yet, when it did act, its duty was to say for what purpose, and with what intent it proposed to act: *Peele vs. Merchants' Ins. Co.*, 3 Mason, 27; *Cincinnati Ins. Co. vs. Bakewell*, 4 B. Mon., 541; *Provincial Ins. Co. vs. Leduc*, L. R., 6 P. C., 224; s. c., 11 Eng. Rep., 84.

Taking what has been said on the subject of acceptance in connection with the facts tending to show the negligence of the defendant in not repairing the steamer in a reasonable time, or tendering the money found necessary by the surveyors to put her in repair, less one-third new for old, the acceptance was fully made out, and justified the verdict which the jury gave: *Copelin vs. Insurance Co.*, 9 Wall., 461; *Peele vs. Suffolk Ins. Co.*, 7 Pick., 254; *Reynolds vs. Ocean Ins. Co.*, 1 Metc., 160; *Reynolds vs. Ocean Ins. Co.*, 22 Pick., 191; *Norton vs. Lexington etc. Ins. Co.*, 16 Ill., 235; *Marmaud vs. Melledge*, 123 Mass., 176.

The defendant, however, contends that the rule recognized by the authorities above cited is modified, and in fact annulled, by the express language of the policy, which provides as follows: "In case of loss or misfortune it shall be lawful and necessary to and for the assured, its agents, factors, servants, and assigns, to give the assurers prompt notice of the disaster, and submit the plan adopted for recovering and saving the property, and to make all reasonable exertion in and about the defense, safeguard, and recovery of the said vessel, or any part thereof, without prejudice to this insurance; and after recovery, and the holding of a survey, by persons chosen by the insurers and insured, or their agents, made under oath, setting forth the particulars of actual damage received by the vessel in the disaster, and discriminating between those and former defects, and wear and tear, the insured are to cause the same to be forthwith re-

paired in accordance with the surveyor's specifications; and in case of neglect or refusal on the part of the insured, its agents or assigns, to adopt prompt and efficient measures for the safeguard and recovery thereof, or to repair the same when recovered, then the said insurers may, and are hereby authorized to, interpose and recover the said vessel, or after recovery to cause the same to be repaired, or both, for account of the insured."

The defendant claims that, under this clause of the policy, it could interpose to rescue the steamer on account of the neglect of the owner so to do, and after recovery, it was under no duty or obligation to repair, but could tender her back to her owner in her wrecked and damaged condition. I cannot accede to this view. The policies under which decisions have been made holding it to be the duty of the underwriter, when he takes possession and recovers a stranded vessel, to proceed with due diligence, and put her in repair, contained a clause somewhat different from the above, and substantially as follows: "In case of the neglect or refusal of the insured to adopt prompt and efficient measures for the safeguard and recovery thereof, and to repair the same when recovered, then the insurers may, and are hereby authorized to recover the said vessel, and cause her to be repaired for account of the insured." What change has been made in the legal effect of this clause by the difference in phraseology, as indicated in the extract above quoted, from the policy in question? It has this extent, and no more; that if, after the insured recovers the vessel, he neglects or refuses to proceed to cause it to be repaired, the insurer may interpose, and do so for account of the insured. The object is that the survey may not be deemed conclusive, or that with other proof, upon the question of damage; but in order to ascertain the extent of the loss, the insured may cause the vessel to be repaired for the purpose of ascertaining the extent of his liability. But the clause only applies where the insured recovers the vessel, and then neglects or refuses to cause her to be repaired; and when the insured neglects or refuses to recover the vessel, and the insurer interposes and recovers her, he must, as before, do both. He must recover and cause to be repaired. There is no clause in the policy which authorizes, nor can it by any reasonable construction be made to authorize, the insurer to rescue the vessel and restore it to the owner in a wrecked or damaged condition. The whole sentence (and indeed the whole policy) must be read and construed together. What the insurer is authorized to do depends upon the neglect or refusal of the insured to perform the

duties enjoined by that clause. These are to adopt prompt and efficient measures for the safeguard and recovery of the vessel, and to repair the same when recovered. The insurer is authorized to interpose, after recovery, to cause the same to be repaired. After recovery by whom? This evidently refers to the neglect of the insured, after recovery by him, to cause repairs to be made, and not to the neglect of the company, after recovery by it, to cause repairs to be made. In the latter case, the insurer having interposed to recover the property, and having it in its possession, no new or further interposition is required by the policy, but the duty is imposed, from the interposition to recover, to proceed with due diligence, and cause the vessel to be repaired. This being the proper construction of the policy, the neglect of the defendant to cause the repairs to be made was evidence upon which the jury were at liberty to find an acceptance by the defendant of the abandonment.

This conclusion renders a decision of the other questions involved unnecessary. The judgment is affirmed.

The other justices concurred.

SUPREME COURT OF PENNSYLVANIA.

Error to Common Pleas No. 3, of Philadelphia County.

FIRE ASSOCIATION OF PHILADELPHIA

vs.

SOLOMON ROSENTHAL.*

The company elected to repair and commenced on the work, but under an ordinance existing at the inception of the policy, the city authorities forbade the repairs to be completed with wood. The insured still refused to accept the sum offered as pecuniary damages, and after a prolonged delay completed the repairs with brick.

Held, That upon exercising its election the company was bound to repair regardless of cost, or pay damages for its failure. The contract of insurance was made subject to the risk of interference by the authorities.

Held, That the obligation to repair was not necessarily confined to the specific material previously used.

Held, That the company was liable for the cost of repairing with brick and for damages resulting from loss of rent through the delay.

W. E. LITTLETON and E. C. MITCHELL, *for Plaintiff in Error.*

DAVID A. GOUBIOX, *for Defendant in Error.*

CLARK, J.

This action of covenant was brought upon a perpetual policy of fire insurance, issued by the Fire Association of Philadelphia, 27th day of August, 1870, to Solomon Rosenthal, "to indemnify the said assured from loss or damage by fire," according to the terms and conditions of the policy, to the amount of \$2,000 on a three-story, brick store and dwelling-house, situate on the north side of Spring Garden, west of Eleventh Street, in the city of Philadelphia. A more particular description of the premises was contained in a

* Opinion filed, October 5, 1883.

survey, signed by the assured and deposited in the defendant's office. The general obligations assumed by the association were to be complied with as expressed in the policy, in the alternative as follows:—

The said association shall within thirty days after proof of such damage, if the loss be not total, proceed with reasonable diligence to put the said building into as good a state of repair as the same was before so injured by the fire, or shall, within sixty days after such proof, pay for such damages, according to an estimate thereof, to be made by arbitrators mutually chosen.

Or, in case of a total loss on this policy, the association shall rebuild the same with convenient speed, or pay the amount insured thereon within ninety days; in either of these cases the deposited money shall be retained and the policy canceled.

The building insured consisted of a three-story brick, a three-story frame, and another two-story brick, in the rear, located in the order named. On the 16th of August, 1881, a fire occurred, and the frame portion of the building was wholly burned out; the other portions were also more or less injured. Notice of the loss was promptly given, and on the 18th of August the association notified the insured that the damages to his buildings had been estimated at \$650, which amount the association was prepared to pay or proceed to repair. Rosenthal refused to accept this sum, and said they might go "ahead with the repairs." The association thereupon instructed their builders, M. B. & Co., to proceed, but after several days' work had been done, notice was given to the association and also to the builders by the building inspectors of the city, that under the ordinance of council of 11th of April, 1863, the rebuilding in wood was condemned, and that the erection of a wooden structure was prohibited. In compliance with the notice, the builders at once abandoned the work, and it was never afterwards resumed. Mr. Rosenthal himself, however, in February, 1882, began, and in April following completed, the repairs, using brick instead of wood as required by the city ordinance. The suit was brought November 15th, 1881. The declaration contained three counts: the first averred a partial destruction of the premises insured, by fire, and a failure of the defendants to pay the loss or repair the building; the second that the defendants had elected to repair, but had failed to do so; and the third that the defendants had offered to pay \$650, or to make the repairs, and that the sum offered having been declined, the defendants thereupon began, but declined to complete the repairs, whereby the building was for a long time untenable, and the plaintiff was deprived of his rents,

etc. The plaintiff's claim was for the cost of making the repairs with brick, the cheapest non-combustible substitute for wood, and also for the loss of rents. The defendants on the other hand, contend that in any event the plaintiff could not recover more than the cost of putting the property in the same condition it was before the fire occurred, and if the burnt portion of the house was of wood, the recovery could not be beyond the cost of a wooden structure; that if the defendants did elect to rebuild instead of paying the loss, they were relieved from any obligations which must arise from such election, if the building inspectors prohibited them from rebuilding the house as it was before the fire, and if the offer of \$650 was adequate to restore the property in wood the payment of that amount would be the proper measure of their liability.

The court refused points to this effect, and instructed the jury that the defendants were liable for the cost of repair with brick, and also for the rents lost from the failure to carry out their undertaking to repair. There was no dispute as to the amount which the plaintiffs should recover under this instruction, and a verdict was taken with the defendant's approval, subject, however, to an exception to the plaintiff's right to recover upon the basis or according to the measure stated. The risk was upon the building as a whole, the loss therefore was but a partial one, and the alternative obligation on the part of the association in the first instance, was within sixty days after proof of loss to pay the damages incurred, or to proceed with reasonable diligence to put the premises "in as good a state of repair as the same was in before so injured by the fire," that the association elected to repair is clearly shown by matters which are undisputed and unequivocal. The defendant's assertion that they were "prepared to pay the \$650," or proceed to repair, the plaintiffs refused to accept that sum, the immediate employment of builders, who were instructed "to go ahead and make the repairs," the delivery of the material upon the ground, and the actual performance of four or five days' work upon it, are facts admitted, which in our judgment prove this point beyond possible question. An election in such case is established by proof of any decisive act, by which the purpose of the party to make a deliberate choice is clearly manifested: *Walton vs. Coulson*, 9 Pet., 62; *Gorrett's Appeal*, 100 Penn. St., 601.

It is also a well-settled rule of law, that when an election is open between alternative conditions of a contract, the alternative chosen must be adhered to; an election once made is irrevocable: *Leake*,

2d Ed., 679; *Bainey vs. Killmore*, 1 Barr., 35; *Beale vs. Insurance Co.*, 36 N. Y., 532; *Heilman vs. Ins. Co.*, 75 N. Y., 7; *Benjamin on Sales*, 359; *Whar. on Cont.*, 623, and cases there cited. When an insurer elects to repair under a clause in the policy giving that right, the conditions of the contract, which before were alternate, are thereby resolved into an absolute agreement. It must be assumed that the election was made in view of all such matters, as in the law otherwise may effect the transaction, and the principles of law incident to the alternative chosen are alone applicable. The amount of the loss ceases to be a question; there can be no inquiry as to that. The original contract by virtue of the election, is a contract to rebuild, and the rights and responsibilities of the parties are to be measured accordingly. There can be no after recovery of the original loss; the insurer, in case of default, is liable only for damages upon the footing of a contract to rebuild or repair, which may be more or less than the amount insured. The rule which produces this result is applicable to contracts in general; we have not found any cases in this court, in which it has been applied to the contract of insurance; but in the courts of some of the States the rule has been very distinctly declared, and thus applied. In *Rider vs. Commonwealth Ins. Co.*, 52 Barb. (N. Y.), 447, it was held that in case of an election to repair, if the repairs are defective, the insurers must make the defect good.

In *Parker vs. Eagle Ins. Co.*, 9 Gray (Mass.), 152, it was held, that if the insurer commences to repair but does not complete, the assured is entitled to recover the difference between the value of the repairs made and what the value would have been if they had been fully completed. See also *Times Ins. Co. vs. Hawke*, 5 H. & M., 935; *Brinley vs. National Ins. Co.*, 11 Met. (Mass.), 195. In *Morrell vs. Irving Fire Ins. Co.*, 33 N. Y., 429, a building was insured against fire to the amount of \$3,000; the policy contained the following clause:—

In case of loss or damage to the property insured, it shall be optional with the company to replace the article lost or damaged with others of the same kind or quality, and to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention to do so within twenty days after having received the preliminary proofs of loss, etc.

The building was destroyed by fire, and the company gave notice that they were prepared to rebuild, and did undertake to do so; the insured alleged that there had not been a substantial compliance with the stipulations to rebuild and brought an action on the policy

to recover the amount of the original loss; it was held that after the election and notice, a contract to rebuild existed between the parties of such a kind that the contractor had received the entire consideration in advance; that if this contract was not fulfilled by the insurer he was liable for the damages sustained by the non-fulfillment of the contract, which may be more or less than the amount insured, and that the action, consequently, should have been brought to recover damages for breach of contract. See also *Wynkoop vs. Ins. Co.*, 91 N. Y., 478.

It is contended, however, that the ordinance of 1863, and the action of the building inspectors in pursuance thereof, prohibited the exact performance of the contract; that the replacement or repair with wood was unlawful, and rendered impossible. But an agreement to put in the same state of repair, does not necessarily imply the employment of the same, perhaps not even of similar material. The same state of repair may be effected by other materials of equal or greater value, suitable and appropriate for the purpose, in view of the location, uses, architectural style, or appearance of the property. The defendant's election imposed no particular obligation to build with wood, if for any reason wood could not be employed. The contract, therefore, involved no impossibility; it did involve a greater expense perhaps, than was anticipated, but the plaintiff was in no way responsible for that; and the existence of a police regulation prohibiting the use of wood, of which they may have had no knowledge, cannot any more relieve them from the obligation of their contract than would the rise of prices of materials in the market. They agreed to put the premises in repair, and they were bound to comply with their contract, using such materials as were suitable for the purpose and were allowed by law. The contract of insurance, and the election under it were both made after the adoption of the city ordinance. The parties of course contracted with reference to the law as it existed at the time, and consented to be bound by it; whether the city authorities would permit the buildings to be repaired in wood was therefore a risk which the insurers assumed at the issuing of the policy, and which they re-assumed at the making of the election: *Brady vs. N. W. Ins. Co.*, 11 Mich., 425. When the fire association made their election in the mode indicated in their contract, the contract became precisely what they elected to make it, and the rights of the parties were thereby fixed. They cannot now recede from their election without the consent of Rosenthal, whatever may be the consequence as to expense.

In *Brown vs. Royal Ins. Co.*, 1 Ellis & Ellis, 853, the defendants executed a policy insuring plaintiff's premises against fire, reserving to themselves "the right to re-instatement in preference to the payment of claims." The premises were damaged by fire, and defendants elected to re-instate them, but did not do so. To an action for not paying compensation or re-instating, defendants pleaded that they elected to re-instate, and were proceeding to do so, when the commissioners of the sewers, under the metropolitan building act, 1885, caused the premises to be taken down, as being a structure in a dangerous condition, and that such dangerous condition was not caused by damage from the fire. On demurrer held by Lord Campbell, C. J., Crompton, J., and Hill, J. (dissenting, Erle, J.), that the plea was bad, inasmuch as the contract to re-instate being lawful at and ever since the time of contracting, the alleged impossibility of its performance was no defense, and defendants were bound, if they could not perform it, to pay damage for not doing so. This case is cited with approval in *Wood on Insurance*, 262, and in *May on Insurance*, 535; and in their discussion of the subject the same general view of the law is by both authors adopted. In some of the States a different or somewhat modified rule has been asserted, but an examination will show that the cases were controlled either by the express provisions of the company's charter or of the contract itself.

If, after having made his election, the insurer fails to proceed with the work with reasonable dispatch liability attaches for damages resulting from such unreasonable delay: *Wood on Insurance*, 256; *Haskins vs. Hamilton Mut. Ins. Co.*, 5 Gray (Mass.), 432. The rental value of property was evidence to aid in the computation. The whole house was shown to have been untenable from the time of the fire until the plaintiff himself made the repairs. If the association fairly undertook the work and afterwards abandoned it, some compensation was due to the assured for the delay which resulted; and whilst rents, as such, were perhaps not recoverable, the rental value of the property was a proper element in the assessment: *Brown vs. Foster*, 51 Pa. St., 165; *Rodgers vs. Remus*, 69 *ibid*, 432. The extent of the damages arising from the delay is not a question in this case, as the verdict was taken with the defendant's approval as to the amount.

Judgment affirmed.

Having elected, and begun to repair, without any qualification as to what kind of material they would use, or how they would make

the repairs, except as provided in the policy, to "put the building into as good a state of repair as the same was before so injured by fire," the order of the building inspectors was no excuse for not performing their undertaking. They were at liberty to use brick or any other non-combustible material; and the destruction of the frame was but a part of the damage done to the building.

The ordinance which authorized the building inspectors being in force when the policy was issued, it must be presumed that the contract was made subject to the ordinance: *Ins. Co. vs. Cropper*, 8 Casey, 355; *Ins. Co. vs. Drach*, 5 Outerbridge, 278; *Burkhard vs. Ins. Co.*, 6 Outerbridge, 266.

The language in the policy sued upon is that of the association, and the clause reserving the right to repair was, doubtless, designed to meet their own convenience. It made it optional with them to use any lawful material that was suitable for putting the building into as good a state of repair, etc.; and having elected under it, they were bound to use such suitable material as the law would permit.

An unlawful intention is not to be presumed: *Pollock's Principles of Contracts*, 302; *Leake on Contracts*, 230.

"If a contract be reasonably susceptible of two meanings, one legal and the other not, that interpretation shall be put upon it which will support and give it operation." 2 *Chitty on Contracts*, (11 Am. Ed.), 977; *Brady vs. N. W. Ins. Co.*, 11 Mich., 425 (s. c., 4 Bennett F. I. C., 663).

"If the insurance company once elects to rebuild, it runs the risk of any rise of price of materials, or of any extraordinary and unexpected difficulty in fulfilling the contract. It must rebuild or pay damages. The ordinary rules governing insurance are dispensed with, and the case is governed by principles applicable to contracts in general."—Prof. T. W. Dwight, in note in 3 *Am. Law Register*, (N. S.), 415.

"If after he (insurer) has commenced to rebuild he is interfered with by the public authorities and prevented from completing his work, or the building is ordered to be taken down as dangerous, even though its dangerous character was not attributable to the fire, the loss will be his." *May on Insurance* (2 Ed., 1882), Sec. 433; 3 *Sutherland on Damages*, 94; *Brown vs. Royal Ins. Co.*, 5 *London Jurist*, N. S., 1,255 (s. c., 4 Bennett F. I. C., 371); *Bank vs. Ins. Co.*, 9 *Ins. L. Jour.*, 930; *Morrell vs. Ins. Co.* (N. Y. Ct. of Appeals), 4 Bennett F. I. C., 766; *Beales vs. Ins. Co.*, 36 N. Y., 522; *Heilman vs. Ins. Co.*, 75 N. Y., 7; *Wynkoop vs. Ins. Co.*, 91 N. Y., 478.

At first glance the New York decisions seem to be, that the election to rebuild supersedes the policy with a contract to rebuild, but a closer examination will detect underneath the loose language of the court, the true principle, which is, as laid down in the English cases, that the election does not create a new contract, but simply narrows the original contract to that one of the two alternatives. Nor does it introduce new principles; it simply carries with it the principles incident to that alternative—the principles that govern building contracts.

In a note in the 9 Ins. Law Jour., 935, the editor says: "Whatever inaccuracies of expression may have been used, the construction usually placed by the American courts on the replacement clause is not essentially different from that of the English courts." *Ins. Co. vs. McLanathan*, 11 Kansas, 533, the court held that the insurers were liable for the damage to the house from exposure to the weather, through their failure to perform their election to repair.

When an insurance company undertook to re-instate, and before completing the work, another fire took place, it was held that, as the re-instatement was not finished before the second fire, the company was not entitled to any reduction for the part done: *Smith vs. Colonial M. F. I. Co., a c. Australia: Hine & Nichols*, Dig. Ins. Decisions, p. 553.

This is a well-established principle of the law of building contracts: *Dermott vs. Jones*, 2 Wallace, 1.

A careful examination of the fire insurance cases reported in this country and Great Britain has failed to find a single case where it has been held that an election to rebuild or repair did not bind the insurer and make him liable for what it cost to do it, regardless of the value of the building as it was before the fire and the amount for which it was insured, except the *Home Mutual Insurance Co. vs. Garfield*, 60 Ill., 124, where the company, which was a mutual one, gave notice and then refused to rebuild because it would cost more than the amount insured. The court held that, although the charter forbade the directors expending for rebuilding more than the amount insured, yet the insured was entitled to recover not only the amount of the policy and interest, but also "the rental value of the ground during the time of the delay caused by the act of the company."

While a careful search has failed to find a case before the Supreme Court of Pennsylvania directly in point, it has proved that the court has always adhered in a clear and decisive manner

to the principle that an election is binding, and that "it is the province of courts to enforce contracts, not to make or modify them:" *Baney vs. Kilmer*, 1 Bar., 35; *Brauer vs. Sheik*, 9 W. & S., 119; *Insurance Company vs. Sennett*, 1 Wright, 205; *Shultz vs. Wireman*, 4 Phila., 121.

But if their undertaking to repair had involved them in "hardship and inconvenience," it would not excuse their failure to repair. "It must be impossibility, not difficulty, that will excuse from performance of a contract:" *Huling vs. Craig*, Addison, 842; *Myers vs. Drake*, 10 Watta, 110; *Commonwealth vs. Comly*, 3 Barr., 372; *The Harriman*, 9 Wallace, 161; *Bullock vs. Demmett*, 6 Term, 650; *Brecknock Co. vs. Pritchard*, 6 Term, 750; *Adams vs. Nichols*, 19 Pickering, 275; *Trustees vs. Bennett*, 3 Dutcher, 513; *Dermott vs. Jones*, 2 Wallace, 1; *Beebe vs. Johnson*, 19 Wendell (N. Y.), 500.

SUPREME COURT OF MICHIGAN.

CARPENTER

vs.

CONTINENTAL INS. CO.*

Evidence to show knowledge on the part of an alleged agent of the insured of other insurance was rightly excluded where no agency had been shown to exist.

The policy provided that if the insured should have or afterwards make another contract of insurance whether valid or not, it should be void.

Held, That insurance procured by a mortgage on the interest of the insured, without the knowledge of the latter, in conformity with a mortgage clause, was not other insurance within the meaning of the policy.

Held, That where after knowledge of such other insurance the company without dissent proceeds to adjust the loss, this is a waiver of the alleged forfeiture.

BALDWIN & DRAPER, *for Plaintiff*.

F. A. BAKER and JOHN ATKINSON, *for Defendant and Appellant*.

CHAMPLIN, J.

The plaintiff was the owner of the undivided half of the premises insured. At the time the insurance which forms the subject of this controversy was effected, Arthur C. Emmons, a grandson of plaintiff, was the owner of the other undivided half. The risk was written in defendant company, September 10, 1880, upon a written application of plaintiff, reference to which will be made further on. In August, 1880, Polly Carpenter and Arthur C. Emmons united in a mortgage to one William R. Jones, of Waterford, Oakland County, Michigan,

* Decision rendered, June 17, 1886.

which bears date the fifth, and was acknowledged by Arthur on the ninth, and by plaintiff on the eleventh of August, and covers the property insured by defendant. This mortgage contains the following clause : " And it is also agreed, by and between the parties to these presents, that the said parties of the first part (so long as the moneys secured by these presents are unpaid) shall and will keep the mortgage interest of the party of the second part, or his assigns, in the buildings erected and to be erected upon the lands above conveyed, insured against loss and damage by fire to the amount of two thousand dollars; and, in default thereof, it shall be lawful for the said party of the second part, his executors, administrators, or assigns, to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount secured by these presents, and payable forthwith, with interest at the rate of 7 per cent per annum."

It was claimed on the part of the plaintiff, and testimony was introduced which had a tendency to prove, that the debt which the mortgage was given to secure was the individual debt of Arthur, and that plaintiff merely joined in the mortgage as surety for him. On the ninth day of September, 1880, a policy was issued by the Watertown Insurance Company, in and by which this company insured Arthur C. Emmons and Polly Carpenter upon the dwelling-house situated on the mortgaged premises in the sum of \$2,000. It was a disputed question upon the trial whether Polly Carpenter knew or had any notice of the insurance in the Watertown Company until after the fire which consumed the dwelling insured in defendant's policy. The plaintiff gave testimony tending to prove that the insurance in the Watertown Company was obtained, without her knowledge, by the mortgagee for his own benefit. There was a clause in the policy stating that the "loss, if any, payable to Wm. R. Jones as his mortgage interest may appear." On the other hand, the defendant's testimony tended to show that the plaintiff's agent had knowledge of the insurance at the time it was made. The jury have found specifically, in answer to a question, that the plaintiff did not know of the issuing of the Watertown policy until after the fire. But the defendant claims that the court committed an error in excluding certain testimony offered by it tending to show that the plaintiff had such knowledge. Defendant produced John H. Dresser, who testified that he was the agent who issued the policy in the Watertown Company; that Samuel W. Smith, of Pontiac, told him that Mr. Jones had a mortgage on the property, and was to have

insurance; that they wanted a policy to secure Jones' interest. Thereupon he examined the property, and while there had a conversation with Elias R. Emmons, and told him that he represented the Watertown Company, and Emmons said that the Watertown Company was one he knew nothing about; that he (Dresser) might look at the house, and if he concluded to take a policy he would notify Mr. Smith, and Smith could let the witness know. The court, on motion, struck out that part of the above testimony relative to what was to be told to Mr. Smith. The witness further testified that he saw Mr. Smith a few days afterwards, but did not then write the policy. Witness was then asked, "What did Smith tell you as to what he had heard from Mr. Emmons?" This was objected to and excluded. The witness then testified that he did not issue the policy right then when he saw Smith, nor for a week or ten days afterwards. The witness was further asked this question, which was rejected on the objection made by defendant that it was leading and incompetent, viz: "When the policy was finally issued, was it taken out in accordance with instructions from Mr. Jones as mortgagee, or whether Smith purported to act in the matter under the instructions or advice of Mr. Emmons or Mrs. Carpenter?" This question was also asked: "I will ask what Mr. Smith informed you when you saw him after going to Orion, and seeing Mr. Emmons?" To which the same objection and ruling were made.

The foregoing rulings are the errors complained of. The defendant had introduced testimony from which it claimed that it had established the fact that Elias R. Emmons was the general agent of plaintiff, and his contention is that the knowledge of the agent is knowledge of the principal, and consequently the plaintiff is chargeable with any knowledge which Elias R. Emmons had of the insurance in the Watertown Company. But no claim is made that either the plaintiff or Elias R. Emmons was ever informed, previous to the fire, that a policy had been issued in the Watertown Company. What was attempted to be shown was that the plaintiff assented that the mortgage interest of Jones might be insured in the Watertown, and this was no more than the express terms of the mortgage provided might be done. The evidence was very remote, if admissible at all. Mr. Smith had already been sworn, and seems to have had no very definite recollection about having had any conversation with Mr. Emmons upon the subject of insuring the mortgage interest in the Watertown. The fair inference from his testimony is that he had no such conversation. As the case stood, the agency of Elias

R. Emmons had not been made out. He was not a party to the mortgage, and had no interest in the property insured. Mrs. Carpenter, being a mere surety in the mortgage, was not interested in having it insured for the benefit of the mortgagee. Under the circumstances, the proposed testimony was rightly excluded.

There is a clause in defendant's policy which reads as follows. "If the assured shall have, or shall hereafter make, any other contract of insurance, whether valid or not, on the property hereby insured, or any part thereof, without consent of this company written hereon, this policy shall become void." The defendant claims that the insurance in the Watertown Insurance Company constituted double insurance, and rendered the policy void. This claim is met by the plaintiff (1) by evidence which, if believed by the jury, would create an estoppel; and (2) by evidence which, if believed, would amount to a waiver of any forfeiture by reason of the prior insurance.

1. There was a written application for the insurance, which was signed by the plaintiff, and delivered to defendant's agent, Mr. Warner. This application the agent claims to have lost. The plaintiff introduced oral testimony of its contents, to the effect that it contained the statement that Mr. Jones held a mortgage upon the property, and that he had the right to get the property insured for \$2,000; that the application was filled out by the agent of the company from information given him by Elias R. Emmons, and was signed by the plaintiff. The policy in question was based upon that application; and, if the company neglected to make the proper entry upon the mortgage, permitting this insurance under the Jones mortgage pursuant to the information contained in the application, they are estopped from now insisting that the insurance obtained in obedience to the mortgage clause by the mortgagee avoids the policy. The application gave the defendant all the information that was necessary to protect its rights, and also to preserve the rights of the mortgagor in case the mortgagee should procure the insurance. To hold otherwise would place the mortgagor in a perilous and uncertain position. The mortgagee could, by obtaining insurance of which the mortgagor had no knowledge, render void all insurance which the mortgagor might have obtained upon the property. We think the mortgagor has complied with the spirit of this clause of the policy when he states in his application the mortgage and the amount of insurance for the

mortgagee's benefit authorized thereby. No fraud or evil consequences can be practiced upon or arise to the insurance company where such statement is made. It can write its policy and frame its risk with reference to such information.

It was a disputed question upon the trial whether the mortgagor, the plaintiff in this suit, knew or assented to the insurance obtained in the Watertown Company for the benefit of the mortgagee. The evidence tended strongly to prove that this insurance was obtained by the mortgagee without any notice or demand having been made upon the mortgagors to do so. It has been held that a policy made by a mortgagor, to cover the interests of the mortgagee, without his knowledge or consent, is not other insurance: *Johnson vs. North British & Mercantile Ins. Co.*, 1 Holmes, 117. And in *Titus vs. Glens Falls Ins. Co.*, 81 N. Y., 415, 416, Mr. Justice Earl, in speaking of a case which is parallel with the one under consideration, says: "It is true that Merrill's mortgage contained a clause providing that he should keep the mortgaged buildings insured, and assign the policy to the plaintiff, and that, in case of default on his part, the plaintiff might procure such insurance at his expense, and add the amount paid thereon to the mortgage. But that clause could not operate until there was default on the part of Merrill, and he could put in default only upon refusal or neglect to procure the insurance after some sort of notice or demand. Besides, the plaintiff, in procuring that insurance, acted for himself and in his own interest, and hence his act in procuring it cannot be so far regarded as the act of Merrill as to violate the clause of the policy now under consideration. It was not other insurance within the meaning of the policy procured by Merrill." See, also, *Fox vs. Phoenix Fire Ins. Co.*, 52 Me., 338; *Ætna Fire Ins. Co. vs. Tyler*, 12 Wend., 507; s. c., 16 Wend., 386; *Carpenter vs. Providence Wash. Ins. Co.*, 16 Pet., 501; *Nichols vs. Fayette Mut. Fire Ins. Co.*, 1 Allen, 63; *Barbank vs. Rockingham Mut. Fire Ins. Co.*, 24 N. H., 550; *Norwich Fire Ins. Co. vs. Boomer*, 52 Ill., 442; *Williams vs. Crescent etc. Ins. Co.*, 15 La. Ann., 651; *Burton vs. Gore Dist. Mut. Fire Ins. Co.*, 12 Grant (U. C.), 156.

In this case the jury have found that the plaintiff did not know, until after the fire, of the issuing of the Watertown policy. This is conclusive, and settles the controversy over this clause of the policy. The assured did not make any other contract of insurance, and consequently there is no ground for claiming that the policy is invalid for that reason:

2. It should it be held that the insurance in the Watertown Company was double insurance, the evidence was sufficient to authorize the jury to find a waiver of the prior insurance in the Watertown Company as a cause of forfeiture under this clause of the policy. That such cause of forfeiture may be waived by the insurer, and the policy be deemed in force, is now too well settled to be drawn in question: *Pennsylvania Fire Ins. Co. vs. Kittle*, 39 Mich., 51; *Lyon vs. Travelers' Ins. Co.*, 55 Mich., 141; *s. c.*, 20 N. W. Rep., 829; *Westchester Fire Ins. Co. vs. Earle*, 33 Mich., 143; *Titus vs. Glens Falls Ins. Co.*, 81 N. Y., 419; *Insurance Co. vs. Norton*, 96 U. S., 234; *Gans vs. St. Paul Fire & M. Ins. Co.*, 43 Wis., 109; *Allen vs. Vermont Mut. Fire Ins. Co.*, 12 Vt., 366. It is also true that, where a policy becomes absolutely void at once upon insurance having been obtained without consent, nothing short of a new contract on valid consideration, or such conduct as, by misleading the insured to their prejudice, would operate as an estoppel, can revive the policy: *New York Cent. Ins. Co. vs. Watson*, 23 Mich., 486. In such case, that is, of prior insurance, the risk never attached; and the premium paid, in the absence of fraud, belongs to the person paying the same, and the insurance company would have no right to retain it. But if, with a knowledge of the fact, the insurer does any act which recognizes the existence and validity of the contract, the premium paid and retained by the insurer will be a sufficient consideration to support the waiver and revive the contract. So, likewise, will the putting of the assured to inconvenience, cost, or expense under circumstances which recognize the continued liability of the company.

In this case the defendant was informed of the insurance in the Watertown Company immediately after the fire, and then might have repudiated any liability upon the contract, but remained silent and inactive. But, instead of this, the defendant, by its agent, after receiving such information, took steps looking towards the adjustment of the loss, and only consistent with a recognition of the continued liability of the defendant. It asked and obtained information respecting the value of the building destroyed by fire, the indebtedness of Mr. Emmons to one Funston, and whether he had, at any time within a year then past, threatened to injure Mr. Emmons by fire or otherwise. Mr. Emmons was acting for the plaintiff in supplying information as to the fire and loss, and adjusting it with the insurance company. In obedience to the request for information by the agent of the company, he made inquiries with ref-

erence to Funston, and made three trips into Detroit, to see and communicate with the agent in reference to the matter inquired about. Upon the whole evidence, I think, if there had been a forfeiture of the policy upon the ground stated by the company, the jury were justified in finding that it had been waived.

In any view we can take of the issues presented to us, the judgment of the circuit court ought to be affirmed.

The other justices concurred.

COURT OF APPEALS OF MARYLAND.

Appeal from the Circuit Court of Baltimore City.

DISTRICT GRAND LODGE No. 5,
INDEPENDENT ORDER OF B'NAI B'RITH

vs.

JEDIDJAH LODGE No. 7.*

A subordinate lodge of the Independent Order of B'nai B'rith had been duly incorporated under an act of the legislature. The grand lodge seeking to gain control of their endowment fund, the scheme was resisted by the subordinate lodge and the charter granted by the grand lodge was forfeited. In a suit instituted by the grand lodge claiming title to the fund by reason of the forfeiture of the charter. *Held*, that the subordinate held the fund in controversy by virtue of its corporate charter, and its right thereto was unaffected by the action of the grand lodge.

The opinion states the case.

M. R. WALTER, ISIDOR RAYNER, and BERNARD CARTER, *for Appellant*.
HENRY F. GABEY and WM. PINKNEY WHYTE, *for Appellee*.

MULLER, J.

It is not our purpose, nor is it necessary to, review in detail the mass of testimony, oral and documentary, contained in, and by agreement made part of, this record. All that need be done is to state briefly the origin of the "endowment sinking fund," over which the controversy has arisen, and its status on the 10th of July, 1884, when the original bill in this case was filed.

"The Independent Order of B'nai B'rith," membership in which

* Decision rendered, March 11, 1886.—From *Eastern Reporter*.

is confined to Israelites, was instituted about forty years ago, and has since increased to such an extent that it now has numerous lodges in most of the States of the Union. Originally the order resembled, in its main features, that of the "Odd Fellows," and other similar voluntary organizations for benevolent purposes, such as alleviating the wants of the poor and needy, visiting and attending the sick, and assisting the widow and orphan. The primary or subordinate lodges are grouped into districts, over which are district grand lodges composed of delegates elected by the subordinate lodges upon a prescribed basis of representation. Above these is a "constitution grand lodge," which meets once in seven years, composed of one delegate chosen by each lodge from among its past presidents.

There is also an appellate court for the settlement of controversies arising within the order. Among the general laws is one which requires each subordinate lodge to obey the ordinances, laws, and resolutions of the "constitution grand lodge," its district grand lodge, and the final decisions of the appellate court, under penalty of suspension and forfeiture of their charters. These charters are paper documents emanating from and issued by the district grand lodges to the subordinate lodges within their respective territorial limits. The revenue of the entire order arises, with the exception of occasional voluntary donations, from fees, dues, or assessments levied upon the members of the subordinate lodges, and the expenses of the higher as well as the inferior lodges are paid out of the income thus derived.

Jedidjah Lodge, of Baltimore, was the oldest and largest primary lodge in this State. At first it belonged to district No. 1, and in 1852 received its documentary charter from the grand lodge of that district. Afterward it fell within the limits of district No. 5, and in 1867 received a similar charter from the grand lodge of that district. This latter district, whose limits were enlarged and changed, now includes the State of Maryland, the District of Columbia, and the States of Virginia, North Carolina, South Carolina, and Georgia. There are thirty-four subordinate lodges in this district, and of all these Jedidjah Lodge continued to be the largest in numbers up to the time the litigation in this case commenced. Two other facts important to be stated in this connection and important to the decision of the question before us, are, that in December, 1853, Jedidjah Lodge was incorporated under the act of 1852, chap. 231, then in force, and in February, 1870, district grand lodge No. 5 was also incorporated under the general corporation law of 1868, chap. 471.

For a long period after its organization Jedidjah Lodge divided its income into two funds: 1st. A beneficial fund devoted to the expenses of the lodge, the support of sick and distressed members, and for such useful and benevolent purposes as the lodge might see proper to promote, and 2d. A widows and orphans' fund appropriated exclusively to the support of the widows and orphans of deceased members. After a time, and after considerable opposition, the district grand lodge adopted an endowment plan by which the sum of \$1,000 was to be paid to his widow and children upon the death of a member, thus practically introducing a system of mutual or co-operative life insurance. The money to pay these endowments was raised by assessments upon all the members of the subordinate lodges, and the grand lodge acted simply as a receiving and disbursing agent; thus, upon the death of a member his lodge gave notice thereof to an officer of the grand lodge, who thereupon issued requisitions upon all the lodges in the district for their respective quotas, and upon receiving the money, transmitted it to the lodge of the deceased member, to be paid to his widow or children, or to the beneficiary designated in his endowment and certificate. In order to strengthen this system an amendment to the endowment law was adopted in 1874, to the effect that a certain portion of the amount assessed upon the death of a member should be paid as above stated, and the balance should be placed to the credit of a fund, to be called the "endowment sinking fund." This fund in each lodge was intrusted to its trustees, who were required to give bond annually, and were empowered to invest the same with the accruing interest in such securities as they may deem best; and it was further expressly provided that "each lodge shall have control of" this fund. These were the provisions of the endowment law as amended in 1878. By an amendment made in 1879 the trustees were directed to invest "in United States registered securities," and the word "custody" was substituted for the word "control" in the provision above cited. By another amendment, made in 1882, a form of registration for the government bonds was prescribed, to the effect that they were "subject to the order of the trustees" of the several lodges. Such in this respect was the state of the endowment law up to February 7, 1884. At this time, or on the 6th of July, 1884, the trustees of Jedidjah Lodge had in their possession, belonging to this sinking fund, \$5,200 in government bonds, registered as above indicated, and \$3,997.66 deposited in a savings bank and awaiting investment.

On the 7th of February, 1884, the district grand lodge, at a meeting held in Norfolk, Va., changed the form of registration, and directed that the bonds be registered "in trust for the Endowment Sinking Fund of District Grand Lodge No. 5." The effect of this was, or was supposed to be by those who opposed it, to vest the equitable title to the bonds in the grand lodge, and practically to take its funds away from each subordinate lodge, or at least to deprive such lodge of all control over it; and Jedidjah Lodge, at a meeting held on the 6th of July following, by a very large majority of its members, refused to allow its bonds to be so registered. The same action was also taken by another large lodge, and was defended upon the grounds, first, that the Norfolk law was irregularly and illegally passed; and, second, that the fund belonged to the lodges, they having paid it in from their own means, and the grand lodge had no right to take it away from them by any legislation whatever.

Immediately afterward, on the 10th of July, 1884, a small minority of the members of Jedidjah Lodge filed the original bill in this case against the five trustees of the lodge. They also, but without any authority whatever, made the lodge itself a party complainant with them. The main charges in this bill against the trustees are that they have conspired with certain other members of the lodge fraudulently to deprive the lodge and the complainants of all the funds in their hands, and to fraudulently divert them from the trust purposes to which they were devoted; that, without any legal authority, they have withdrawn those deposited in bank, and have openly and publicly declared that they have severed their connection with the order, and intend to retain all said funds, and use them for such purposes as they and their co-conspirators may agree upon. The court thereupon, and in accordance with the prayer of the bill, granted an injunction, and appointed a receiver to take charge and possession of the lodge and all its funds, and directed the defendants to deliver the same to him, subject to further order. The trustees promptly complied by handing over to the receiver not only the bonds and money belonging to the sinking fund, but also a considerable sum, amounting to over \$3,000, which was a lodge fund proper, and then answered the bill. In this answer they deny the conspiracy charged against them, and aver that whatever declarations may have been made by individual members of the lodge as to their disapproval of certain things sought to be done therein, and as to their desire legally to sever their relations with it they them-

selves never intended, and never declared that they intended, to retain these funds, and use them for any other purposes than those for which they were raised, and for which they were intrusted to them. The defendants then moved to dissolve the injunction, and discharge the receiver. Under this motion a large mass of testimony was taken, in regard to which all that need be said is that, in our opinion, it entirely fails to sustain the material allegations of the bill to which we have referred. If, therefore, the case had been brought to a hearing upon the bill, answer, and this testimony, the injunction ought unquestionably to have been dissolved, the receiver discharged, and the bonds and money restored to the defendants.

But another phase of the case is presented by what took place pending these proceedings. It appears that the district grand lodge, at a special meeting held on the 19th of August, 1884, forfeited the charters of these two lodges. After this, and after the testimony had been taken, the grand lodge came in and filed "an original bill in the nature of a supplemental bill." In this bill the complainant, after setting forth various sections of the laws and constitutions of the order, and averring the lawful forfeiture of the charter of Jedidjah Lodge thereunder, claimed that by reason thereof the funds in the hands of the receiver have become vested in, and now belong to the complainant; and that it is entitled to the possession of the same. It also avers that the charter of Jedidjah Lodge having been thus forfeited, the complainant is the only body, under the laws and constitutions aforesaid, to whom the court can turn over these funds and securities, and for this reason it has become necessary for it to intervene in this case by way of a supplemental bill, and make claim to the ownership, possession, and custody thereof.

The prayer of the bill is for a decree directing the receiver to deliver these funds to the complainant and for general relief. The parties made defendants to this bill are Jedidjah Lodge itself and one hundred and twenty-six of its individual members. The complainant moreover sues as "a corporation duly incorporated under the laws of the State of Maryland," and the bill further alleges that Jedidjah Lodge was likewise "a corporation duly incorporated under the laws of said State, and until the period of its forfeiture," on the 19th of August, 1884, "a subordinate lodge of said District Grand Lodge No. 5."

The defendants, in their answer to this bill, admit that their lodge was chartered under the laws of the State and deny the right of any

body of men to forfeit or annul that charter or to take from them their property or money. They also deny all claim to the ownership or possession of these funds on the part of the complainant, as well as all charges of fraud or conspiracy on the part of the trustees or the members of the lodge, and rely upon the proceedings heretofore taken in the case.

At the hearing the court passed a decree directing the funds and securities in the hands of the receiver to be delivered and restored to the custody of Jedidjah Lodge, dismissing both the original and supplemental bills without prejudice, dissolving the injunction and discharging the receiver. From this decree the district grand lodge, the complainant in the supplemental bill, has appealed.

As the case is thus presented, we do not see how it is possible to reverse this decree. The act of 1852, chap. 231, under which Jedidjah Lodge was incorporated, vested it with the usual corporate powers, including that of holding, using, and disposing of property, real and personal, to the amount of \$50,000; and the legislature reserved to itself the right "to modify, amend, or annul the charter of any corporation that may be formed or established under and by virtue of this act." Nothing can be plainer than the proposition that the charter thus granted by the State cannot be forfeited by the grand lodge, whether acting in its conventional or corporate capacity. That charter can be annulled by the legislature or forfeited under the proceedings for that purpose as are authorized by statute or by the common law, and in no other mode, nor by any other agency. The utmost effect, therefore, that can be attributed to the action of the grand lodge on the 19th of August, 1884, is the forfeiture of the documentary or conventional charter which it granted to the appellee in December, 1853; but the appellee and the other defendants to the supplemental bill stand upon this State charter, which is still in force. They hold the funds in controversy and have the right to hold them under the corporate powers thus conferred, and they so hold them entirely unaffected by the forfeiture, by virtue of which alone the appellant in its supplemental bill claims them. The affirmance of the decree may, therefore, be well rested on this ground without reference to the doctrine that a court of equity never lends its aid to the enforcement of forfeitures and penalties.

Decree affirmed.

SUPREME COURT OF MICHIGAN.

ALLNUTT

vs.

HIGH COURT OF FORESTERS.*)

Whatever advantages may exist in affiliation with other associations, the rights of Michigan corporations must be governed by the laws of Michigan, and corporate privileges cannot be destroyed in violation of them.

No corporation can allow its members to be disfranchised by another body for any cause, or in any manner, which it could not have adopted for itself in the premises.

Where a corporator is deprived of valuable corporate rights in a beneficial society by interference, to which he has not assented, by an outside body, whose powers in the premises are not derived from the incorporation laws of the State, he can call upon his own corporation to do him justice.

All by-laws must be reasonable, and if not so are void.

The discipline to which a member of a beneficial society is liable for the offense of libeling another member is not ever to be exerted upon vague charges of libeling, and only in cases where the libel is without any reasonable cause.

JAMES H. POUND, *for Relator.*

CASE & CARPENTER and T. C. PROSSER, *for Respondents.*

CAMPBELL, C. J.

Relator complains that he has been unlawfully suspended from membership in Court City of the Straits, which is an incorporated society of the order of Foresters, organized originally under affiliation with the general system of societies of that brotherhood, and obtaining corporate powers under the general statute for benevolent

* Decision rendered, June 27, 1886.—From *Northwestern Reporter*.

associations. He asks a mandamus to restore him, and the subsidiary high court is impleaded as the superior body under whose order the alleged wrong was done. It appears from the showing on both sides that the Forester associations, which originated in England several years ago, act together, by means of local lodges, usually called "courts," all of which are in some measure subordinate to the subsidiary high court, which appears to be a body of delegates which has, among other things, a court of final arbitration to which appeals lie from lower courts.

Allnut, the relator, who is a member of the City of the Straits court, was charged, by complaint of another body (the Peninsular) with defaming a member of the latter body, whose name is not given in the complaint. The complaint was entirely general, giving no details whatever of the alleged defamation, and was not made by the party injured, as it should have been. It was, however, tried before the proper body in the corporation to which Allnut belonged, and he was unanimously acquitted. The person referred to appears to be one John H. Lays, who occupies a high office in the subsidiary high court, and who turns out to have been charged with dishonesty and immorality. The Peninsular court, whose right to do so we have not found in the rules, undertook to appeal, making Court City of the Straits respondent in the appeal. The latter appeared, before the arbitration board, represented by relator and another person, who, by what was called a "demurrer," but which was in fact what in law would usually be called an "answer," and was entirely appropriate, raised several objections, a part of which went to the competency of the members of the board of arbitration, and were challenges for cause. The board overruled the other objections, and failed to consider the challenges. The appellee refused to appear further, and the board proceeded to dispose of the matter without the production of any of the letters or other articles claimed to be libelous, and without any proof of their contents, and undertook to reverse the acquittal, and sentenced Allnut to a fine of \$15, and to two years' suspension. This being communicated to the inferior court, the second respondent here, he was required to desist from any further action as a member, as it is admitted by his local society, which regarded the action of the subsidiary high court as illegal, but did not feel justified in defying it. We are now asked to re-instate him.

The Detroit society being a corporation under our laws, the rights of its members are entitled, in a proper case, to protection. The

questions discussed relate to the propriety of our interference in this case.

Under our statutes, the corporation in question has the right and duty of determining the conditions of membership. This it has done by its by-laws, and we find nothing in them which makes such membership subject to the action of any outside body. The subsidiary high court is not an incorporated body, under the laws of this State. One of the objections raised to its action here is that the rules of the order require it to become incorporated. We shall not undertake to discuss that question, but there is evidently much reason for it, as it would be contrary to the general legal rules to allow membership in a corporation to depend on the will or action of an unincorporated outside society. Whatever advantages may exist in affiliation with other associations, the rights of Michigan corporations must be governed by the laws of Michigan, and corporate privileges cannot be destroyed in violation of them. If there are rights independent of those of corporators, they stand on a footing of their own. If members see fit to subject themselves voluntarily to arbitration, it would not be desirable for this court to undertake to review the action of extrajudicial bodies, and intermeddle with their action in the course of delegated power. But where a corporator is deprived of valuable corporate rights by interference to which he has not assented, he can call upon his own corporation to do him justice. In the present case, if relator is shut out from his corporate rights, he loses privileges of considerable pecuniary value; as benefits and support during sickness, and other similar aid. If these were entirely distinct from his social privileges, the latter would be left to the social forum. But whether joint or distinct, we can only look at the case as one where the rights are of tangible value, and determine them accordingly. We shall not, therefore, discuss the mutual relations of these bodies on any other basis, and we shall consider the action had against Allnutt merely to see whether it is such that, by his tacit recognition of the usage of the order, he can be held bound by the proceedings complained of.

It may be fairly held that no corporation can allow its members to be disfranchised for any cause, or in any manner which it could not have adopted itself. All by-laws must be reasonable, and if not so they are void. This order professes to be dependent for its methods and usages on those of an English corporation, which must be supposed subject to the same common-law rule of reasonableness. All by-laws and regulations must be construed, therefore, on

that principle; and so construed, the proceedings here are very singular.

Assuming that the society to which relator belongs has accepted, as it seems to have done, the rule that a member may be disciplined for libel of another member, yet the English rules expressly, and the American rules by the only implication which is reasonable, restrict the punishment to cases where the libel is without any reasonable cause. It is well-settled common law that the mere fact of defamation of another member is no cause of discipline. Any other doctrine would be monstrous, and it cannot be held that a corporation in this State shall deprive any member of his rights unless he is himself grossly in fault. Neither can any one be called on to meet vague and uncertain charges. The charge here was no charge at all, and the conviction itself does not show who was defamed, or by what means.

Passing by other defects, which are, however, very serious, the rules of the order, assuming them to be valid, limit fines in this class of cases to five dollars. Article 21. The American rules differ in this from the English; but neither code allows more than one form of punishment to be imposed. Article 24. Fine, suspension, or expulsion may be imposed, but there is nothing in any of the rules allowing a double punishment. In the absence of direct provisions to the contrary, it is well settled that power to give an alternative sentence does not authorize a double one, and that any such sentence is void. Giving to the peculiar affiliation shown here the widest possible effect, and assuming—what all parties have assumed, for the purposes of this proceeding—that the corporation has subjected itself and its members to the complete system of the order, the sentence given is null and void, and the prosecution itself entirely unauthorized. Had the proceedings been properly instituted, and the sentence competent, we should have declined to scrutinize what might be treated as resting on a jurisdiction by consent. But these proceedings disregarded all correct principles, and we think it proper to require relator's restoration, and, for this purpose, the writ must go to the defendant corporation, without costs, as we are satisfied that body has meant no wrong.

So far as the other respondent is concerned, we do not propose to review its action directly, because it is not a body known to the law, and the action is void according to its own code. It is denied, on its own behalf, that this body is a corporation, and, that, being so, the appearance of Mr. Lays amounts to nothing, and the Detrait

corporation must be considered the only respondent whom we can recognize as before us. We have looked into the proceedings, because pertinent to the corporate action of the legal respondent, and have considered the arguments so ably presented in behalf of the high court. It is much to be regretted that so much personal bitterness has governed parties who should have been impartial. No association can hold together if its authorities are not disposed to respect the rights of members fairly and in accordance with impartial justice.

The writ must issue, as above suggested.

Sherwood and Morse, J. J., concurred.

CHAMPLIN, J. (dissenting). I fully agree with the chief justice that no mandamus should issue against the subsidiary high court of the United States Ancient Order of Foresters. I also think that no mandamus should be granted against the Court City of the Straits, No. 6,664. The writ of mandamus is a discretionary writ, and ought never to issue when there exist other adequate remedies, or unless substantial justice will be promoted by its enforcement. When the conclusion is reached that the subsidiary high court is not amenable to this process, there is no contention left. The relator and the Court City of the Straits, No. 6,664, are in perfect accord. It filed an answer admitting all the averments in relator's petition to be true. It voted money for relator's benefit to prosecute his suit. It never has carried into effect the award of the final arbitrators suspending the relator, and he has not been suspended by the Court City of the Straits, No. 6,664. If the relations of the relator with the Foresters have been suspended, it has been done by the voluntary act of relator. So far as the Court City of the Straits, No. 6,664, is concerned, it appears that it is willing and anxious to restore the relator to every right and position which he has lost, and consequently the writ of mandamus is entirely unnecessary, for the purpose of compelling it to do an act which it is willing to do without compulsion. It is claimed that this should be done because it is a corporation, and hence is subject to be dealt with as such. But defendant makes no complaint against this body as a corporation or otherwise. He has not been moved or deprived of any of his rights and privileges as a corporator by any act of the corporation. It seems unnecessary to say anything further, although it appears quite plainly that the relator's grievance does

not arise out of any act of the corporation. It is possible that there is a legal corporation of the Court City of the Straits, No. 6,664. That I shall not attempt to determine. But if there is such a corporation, it is one without officers or by-laws, and none of the rights and privileges claimed by the relator are derived from, or depend in any manner upon, corporate existence. These all flow from laws, rules, and regulations of the voluntary association denominated the Ancient Order of Foresters. His original entry into this order was voluntary, and under a promise to abide by the constitutions, laws, and regulations of the society. These laws and rules, whether reasonable or unreasonable, do not concern us. We have no power to declare them unreasonable or void; and nothing is plainer than that one connecting himself with such a voluntary society must be content with such treatment as he receives which does not violate his person. He cannot proceed in a court of law to vacate or reverse their action, nor can he compel them to retain him as a member of their society against their wishes. The connection of the Court City of the Straits, No. 6,664, with the subsidiary high court, or with the society of Foresters, is not in virtue of the former being a corporation, but by virtue of a charter from the latter court. If this charter should be arrested, the corporation might not be dissolved, but the members belonging to the chartered court would lose the rights and privileges granted to it by the charter, and would cease to be members of any court. Restoring the relator to the corporation will not restore him to the rights, benefits, and privileges derived from being a member of a chartered court under the subsidiary high court.

I think the mandamus should be denied.

SUPREME COURT OF INDIANA.

On Appeal from the Spencer Co. Circuit Court.

PHOENIX FIRE INS. CO. }

vs. }

WILLIAM S. LAMAR.* }

A provision that other insurance procured without consent, whether valid or not, shall render the policy void, is violated by procuring another policy without consent, though such policy be also invalid according to its terms by reason of other subsisting insurance.

MITCHELL, J.

This was a suit by William S. Lamar against the Phoenix Insurance Company to recover for an alleged loss by fire under a policy of insurance, issued upon the property of the former. The policy contained this condition: "If the assured shall have or shall hereafter make any other insurance (whether valid or not) on the property herein described, or any part thereof, without the consent of the company written hereon," this policy shall be void. The insurance company answered that the conditions above set forth had been violated in this, that the insured had, prior to the receipt of the policy on which suit was brought, accepted a policy of insurance for \$500, covering a part of the property insured, which policy so accepted had been issued by the Germania Insurance Company of New York, and which remained in force at the time that in suit was taken out, and that no consent to this latter policy was indorsed on the policy in suit, or was otherwise given. To this it was replied that the Germania pol-

* Decision rendered, May 26, 1896.

icy contained a provision avoiding it in case of the existence or subsequent procurement of other insurance upon the property therein described, unless specially agreed to in writing in or upon such policy, that at the date the Germania's policy was received the assured held a policy for \$2,000, issued by the Home Insurance Company of New York, covering, and that no consent by the Germania had been given to the policy which the assured held in the Home, and that for that reason the policy held in the Germania was, and had been at all times invalid and void. Upon demurrer this was held a sufficient reply. A recovery was accordingly had for the amount stipulated in the policy.

The reply it will be observed, seeks to avoid the effect of the condition against other insurance, by the assumption that only such other insurance as is valid and enforceable is within the inhibition of the contract. Since, however, there is put forward no claim of mistake, surprise, or other circumstance which would authorize a modification of the condition, or relieve the insured from its effect, the contract as the parties have deliberately chosen to make it for themselves must furnish the measure of their rights. The inquiry must be, what have the parties agreed to?

In determining the liability of insurance companies, stipulations similar to that above set out have been the subject of much discussion and not a little contrariety of opinion. There are cases in which the condition in respect to further insurance is general, the conventional phrase "whether valid or not" being absent, which proceed upon such a construction of the contract as brings within its prohibition only such other insurance as is valid and enforceable. That other insurance has been taken by the insured, which at the time of the loss is inoperative or voidable, so that no action could be successfully maintained for its recovery, is held in the cases referred to not to operate in avoidance of a policy containing the ordinary stipulation against such further insurance. Conspicuous among the later cases which adopt this view are the following: *Southerland vs. Old Dominion Insurance Company*, 31 Grat., 176; *Insurance Co. vs. Holt*, 35 Ohio St., 189; *Dahlberg vs. St. Louis etc. Co.*, 6 Mo. App., 121; *Gee vs. Cheshire etc. Co.*, 55 N. H., 65. To the foregoing may also be added *Hubbard vs. Hartford Fire Ins. Co.*, 33 Iowa, 325, which in a modified form holds the same general doctrine. On the other hand, cases which seem well supported in reason proceed upon the theory that the only purpose for which provisions of the character under consideration are inserted in poli-

oies is to protect the insurer against the hazard of overinsurance, by taking away the motive which the insured might otherwise have for the destruction of his own property. Other insurance taken without consent, whether valid or not, is held to avoid the policy in violation of which it has been taken. The assumption is that the vigilance of the property owner will be stimulated to guard against loss by requiring him to maintain such relation to the property insured as that its destruction by fire shall not inure to his pecuniary benefit.

Such being confessedly the purpose of the contract, it is not perceived how its object is in any degree promoted by the conclusion that, notwithstanding the insured may have intended to secure overinsurance, and may have firmly believed he had succeeded in doing so, it is only when the attempt is actually successful that the prohibitory condition is operative. It might be said with much reason that such a construction defeats the purpose of the provision, and renders it practically nugatory.

Moreover, to hold that only such other insurance as is not void, and cannot be avoided by extraneous facts, is within the prohibition of the contract, affords the opportunity for the anomalous spectacle of an insured avoiding the effect of apparent overinsurance and compelling payment of one policy by exhibiting his own turpitude in obtaining another.

It is held in some cases that subsequent or further insurance, created by policies which are totally void, is no obstacle in the way of a recovery on the policy on which the claim is made: *Rising Sun Ins. Co. vs. Slaughter*, 20 Ind., 520. If, however, such policies are voidable only for some breach of condition for which the insurer might avoid them, they are within the prohibition against further insurance: *Funk vs. Minnesota etc. Ins. Ass'n*, 29 Minn., 347; *a. c.*, 13 N. W. Rep., 164; *Baer vs. Phoenix Ins. Co.*, 4 Bush., 242; *Suggs vs. Liverpool etc. Co.*, 9 Ins. Law Journal, 657; *Landers vs. Watertown Ins. Co.*, 86 N. Y., 414; *Bigler vs. Ins. Co.*, 22 N. Y., 402; *Lackey vs. Georgia Ins. Co.*, 42 Ga., 459; *David vs. Hartford etc. Co.*, 18 Iowa, 69; *Carpenter vs. Providence etc. Co.*, 16 Pet., 495.

It is, however, not necessary for us to determine, or further intimate an opinion upon the proper construction of a policy which simply stipulates that other insurance taken without the consent of the insurer shall render the policy void. It may well be presumed that the prevailing uncertainty and contrariety of opinion on that subject was the efficient cause for introducing into the policy sued on the

phrase which distinguishes it from the policies involved in the cases referred to. The contract is that other insurance, "whether valid or not," taken without the written consent of the insurance company shall render the policy void. It was thus agreed that the validity or invalidity of other insurance, taken without the written consent of the insurer, should not be the subject of future contest. Any contract of insurance so held or accepted, was to render the policy in suit void. This agreement was not against public policy, nor prohibited by law. So far as it appears, it was with a full comprehension of its terms deliberately entered into. It is therefore to have effect according to its plain and obvious meaning: *Northwestern etc. Co. vs. Hazlett*, 105 Ind., 126; s. c., 4 N. E. Rep., 582; *Continental Ins. Co. vs. Hulman*, 92 Ill., 145; *Liverpool etc. Co. vs. Verdier*, 35 Mich., 395.

So far as appears, the policy in the Germania Insurance Company was regarded both by the insurance company which issued it and the assured as being valid and in force at the time the policy in suit was accepted, as well as when the loss occurred. Whatever we might conclude in respect to the ordinary condition concerning further insurance, we are clear that where the parties, as in the case before us, had stipulated in their contract that other insurance, "whether valid or not," shall avoid the policy, the effect of such a stipulation cannot be avoided by showing that the prohibited insurance was invalid. As applicable to a policy embracing a condition of that description this general principle may be stated: If the prohibited policy held or received by the insured is in and of itself invalid and void, so that it in fact constitutes no contract of insurance it will not affect the validity of that under which the claim for indemnity is made; but if to avoid it requires the production of facts extraneous to the policy, it will be within the condition against further insurance and unless consented to, will render the other voidable. We are thus led to the conclusion that the court erred in overruling the demurrer to the reply.

A further question arising upon the evidence is suggested, but as upon the facts disclosed, it cannot be material in view of future considerations that we decide it without considering that question, the judgment is reversed with costs, with directions to the court below to sustain the demurrer to the second paragraph of reply, and for further proceedings not inconsistent with this opinion.

Judgment reversed.

VOL. XV.—44.

SUPREME COURT OF VERMONT.

GENERAL TERM, MAY, 1886.

CONTINENTAL LIFE INS. CO. }

vs.

CURRIER.*

A bill in equity, brought to restrain the collection of a judgment, will be dismissed, when every question involved was litigated in the suit at law,—the pleadings permitting it, and the evidence the same, except more in detail.

Bill in chancery, heard on a master's report, March term, 1885, Washington County, Powers, Chancellor. Bill dismissed. John Currier vs. Continental Life Ins. Co. is reported in 57 Vt., 496. That case was an action of assumpsit brought upon the same policy of insurance which is the subject-matter of this litigation.

In that case the defendant pleaded the general issue, tender, and offset. The policy was dated November 14, 1865, and was issued upon the life of Sarah M. Currier, wife of said John Currier.

The policy was issued upon the "half-note plan." The exceptions in the action at law state: "The defendant offered in evidence said four promissory notes, which are referred to and made a part hereof. After the testimony was closed the defendant asked the court to rule that plaintiff could not recover, for the reason that the plaintiff had not alleged or proved an insurable interest in the life of Sarah M. Currier; but the court refused to so rule, to which ruling the

* Opinion filed, July 6, 1886.—Reported by John H. Senter, Esq., of the Montpelier bar.

defendant excepted. The court directed a verdict, pro forma, that the plaintiff recover of the defendant the amount of said policy less the amount of said notes, in accordance with the statements and computations by Mr. Hinkley, to which the defendant excepted."

The judgment below was affirmed by the supreme court. The master found in this proceeding in part as follows:—

"As before stated the sum of \$554.12, by defendant sent to orator by express as aforesaid, included the interest to November 15, 1870, upon all of defendant's notes held by orator. Defendant never paid any more interest on his notes unless he was entitled to dividends which should have been applied to the extinguishment of interest.

The policy matured by the death of Sarah M. Currier on the 3d day of February, 1882. In June, 1882, orator sent the defendant a check for the sum of \$2,677.91, being the amount orator claimed defendant was entitled to receive, which amount was the face of the policy without dividends less the amount of defendant's four outstanding notes. Defendant refused to receive said check in payment of the policy and returned the same to the orator, and soon after commenced his action at law upon said policy in Washington County Court against the orator, which suit was made returnable to the March term, 1883, of said court, and was continued and tried at the September term of the same year before a jury. In that case the plaintiff claimed to recover the sum insured in and by said policy, less the amount of said notes after applying thereon dividends which he then and now claims were voted by orator's board of directors, and which defendant claims have been paid to other policy-holders. Defendant obtained a verdict and judgment thereon for all he claimed."

December, 1883, the company changed its dividend plan to what is called the "contribution plan;" by which plan the policy-holder is allowed as a dividend the amount contributed by his policy to the surplus, as near as can be ascertained.

It is claimed by orator that defendant is not entitled to dividends because he failed to pay the interest in advance on his notes after November 15, 1870. In respect to this claim it is found that defendant understood, when he made application for, and when he received this policy on the half-note plan, that he would be required to pay the interest in advance upon his notes, and for five years he did so pay the interest.

The orator never in any of its circulars, or in any other manner, informed defendant, or any other policy-holder, that failure to pay

interest on notes given for premiums or any part thereof would be deemed a forfeiture of right to dividends. No vote was ever passed to that effect by said board of directors, nor was there any by-law to that effect.

Defendant claims that he is entitled to dividends more than sufficient to cancel all interest on his notes. It is claimed that the judgment in the suit at law in Washington County court affirmed by the supreme court constitutes a bar to this suit. In respect to this claim it is found: That the same evidence was before the jury in that suit as was before the master in this cause, varying only in detail. A copy of the former case, as presented to the supreme court, and a copy of the stenographer's transcript of the testimony, and the plaintiff's (now defendant's) brief was before the master, and the same are herewith returned and referred to. In the former case the claims of the parties were the same as made in this case. The testimony was substantially the same, except that before the master the matter was gone into more in detail. The orator's principal witness before the master was H. R. Morley, actuary of the orator; he was also a witness in the case at law above referred to and orator had full opportunity to inquire of him in respect to any matter deemed material to the issue. But orator claims that the subject-matter of this litigation is adapted only to a court of equity, and that orator in a court of law could not avail itself and have the full benefit of its defense.

In the trial of the former suit the (now) defendant did not claim either in county or supreme court that orator was not entitled in a court of law to the full benefit of the facts in the case. Some time before the trial in county court, the plaintiff in said cause (defendant in this cause) gave notice to the defendant (orator in this cause) in the words following: "To C. W. Porter, attorney of the Continental Life Insurance Company. On the trial of the cause of John Currier vs. Continental Life Insurance Company, you are hereby notified to produce all of the records of said company which show or tend to show each and all dividends allowed, or votes of said company on each and all policies which it has issued from the 14th November, 1865, to the first day of January, 1882. And said company is also hereby notified to produce the aforesaid records—all of them—at the trial aforesaid, for the use of the plaintiff." The records referred to in said notice were not produced in the case at law, but were produced before the master.

Since 1877 no dividends have been paid to stockholders upon the capital stock of the company; prior to that time dividends were paid annually to the stockholders, varying from 2 to 8 per cent, but upon what amount of stock or whether the same was paid in stock or otherwise did not appear in evidence."

The bill was brought to restrain the collection of the judgment rendered in the suit at law. It was claimed that the defendant was not entitled to dividends.

C. W. PORTER, *for the Orator*

This suit was brought to restrain the collection of the judgment against the orator specified in the master's report, and for an adjudication that the defendant was not entitled to have the sums claimed as dividends applied toward the payment of the notes given for premiums, upon equitable grounds.

The orator has equitable rights, not cognizable in a court of law, which, in a court of equity, should prevent such an adjudication as was made in the suit at law: Story Eq. Jur., Sec., 1,573; Dunham vs. Downer, 31 Vt., 249.

It was inequitable to allow a mortuary dividend upon the defendant's policy, when none have been allowed by the company in settlement of policies since 1870.

No dividends have ever been allowed or declared on paid-up policies whose holders have failed to pay interest on their notes; and the holder of this policy should stand no better than his fellows.

By non-payment of interest on notes, in violation of his contract, the defendant forfeited the right to dividends. The company has never paid nor declared dividends on policies whose holders had not paid interest on their notes.

S. C. SHURTLEFF, *for Defendant.*

The judgment in the suit at law is a bar. The evidence, the issues, and the parties are substantially the same: Tyler vs. Hamerly, 44 Conn., 419; Bellows vs. Stone, 14 N. H., 203; Bank vs. Burnet Mfg. Co., 33 N. J., 486; Windfield vs. Bacon, 24 Barb., 154; Savage vs. Allen, 54 N. Y., 453; Briggs vs. Shaw, 15 Vt., 78; Fletcher vs. Warren, 18 Vt., 45; Day vs. Cummings, 19 Vt., 496; Dunham vs. Downer, 31 Vt., 250; Truly vs. Wanzer, 5 How., 141; Creath vs. Sims, 5 How., 192; Walker vs. Robus, 14 How., 584; Smith vs. Molver, 9 Wheat., 532; Henderson vs. Huckley, 17 How., 443; Ayard. Valan-

cia, 39 Cal., 292; Duncan vs. Lyons, 3 John. Ch., 356; Foster Bank, 17 Ala., 692.

TART, J.

Every question in this case was litigated in the suit at law. The pleadings permitted it; the evidence was the same, varying only by being more in detail in this cause. The case having been once adjudicated this bill was properly dismissed.

Decree affirmed and cause remanded.

SUPREME COURT OF INDIANA.

Appealed from the Marriion Co. Superior Court.

NATIONAL BENEFIT ASSOCIATION OF
INDIANAPOLIS.

vs.

MINNIE GRAUMAN.*

An averment of notice and proofs, according to the requirement of the certificate, is sufficient.

An averment of death from apoplexy caused by bodily injuries due to a fall is sufficient averment of death from bodily injuries of which there is some visible sign, and not from disease, where the particular facts are detailed.

The burden of proof in case of alleged breach of warranty in the application is on the company.

MITCHELL, J.

This action was brought by Minnie Grauman on a certificate of membership issued by the National Benefit Association of Indianapolis to Isadore Grauman. It was stipulated in the certificate that the sum represented thereby should not exceed \$5,000, which sum was to be paid to Minnie Grauman within sixty days after the receipt of satisfactory proofs that Isadore Grauman had sustained, during the continuance of his membership, bodily injuries, effected through external, violent, and accidental means, which had occasioned his death within six months from the happening of such injuries. To each of the two paragraphs of the complaint a separate demurrer was overruled. This ruling was assailed on two grounds.

It is said the complaint is insufficient because it is not averred in either paragraph that satisfactory proof of the death of Isadore Grauman was furnished sixty days before bringing the suit. It is

* Decision rendered, May 25, 1886.

averred in each paragraph of the complaint, substantially, that on the 28th day of April, 1882, upon a blank furnished by the association for that purpose, notice in writing was furnished of the injury and death, and that thereafter, at the request of the association, other proofs and notice were furnished which were to be, and were substituted in place of the notice and proof originally forwarded. Coupled with the further averment which follows, to the effect that the defendant has wholly failed and still fails, and refuses to comply with the terms and conditions of the certificate on its part, by refusing to pay, the averment is sufficient. It should have been averred explicitly that notice and proof had been made sixty days before the commencement of the suit, or that the plaintiff had performed all the conditions on her part to be performed. An attempt was, however, made to aver notice and proof according to the requirements of the contract, following which it is charged that the defendant was then in default for not having paid according to the conditions of the certificate. As the defendant could not have been in default, in the absence of such proof as the contract stipulated for, the inference necessarily arises that the proof furnished was such as the certificate required.

The other objection urged against the complaint is that it fails to aver that the death of Isadore Grauman did not result from disease. It was stipulated in one of the printed conditions annexed to the certificate of membership that the benefits of the certificate should not extend to any case in which there were no symptoms or visible sign of bodily hurt, nor to any case in which death or disability should occur in consequence of disease. We agreed that, in order to recover, death must have occurred within the limits of the risk assumed by the contract. The condition above mentioned limited the risk to a case of death proximately caused by physical injuries of which there should be some visible, external sign. It excluded liability in case death resulted from disease or bodily infirmity. The complaint, however, made a case within the rule above stated. It is averred in both paragraphs that the assured sustained certain bodily injuries which were occasioned by two separate falls, the effect and results of which are minutely described. The injuries were in part external and visible. They resulted in apoplexy and death.

The averments leave no room to doubt that death resulted from bodily injury, and not in consequence of disease. The fall and injury upon the head may have resulted in apoplexy. That the injury resulting from the fall produced a condition aptly designated by

that name did not render it any less the cause of death : *Terre Haute and Indianapolis R. R. Co. vs. Buck*, 96 Ind., 346.

Conceding all that is said in respect to the necessity of showing, as a condition precedent to a right of recovery, that death was not the result of disease, we are nevertheless constrained to hold, since the particular facts are averred which show the physical injuries sustained by the assured, and that death resulted therefrom, that the idea is thereby effectually excluded that death could have resulted in consequence of disease. The demurrer to the complaint was properly overruled.

In the certificate of membership it was stipulated, in effect, that any statements made by the assured in his written application were to be considered as warranties that such statements were in all respects true. The court instructed the jury that the burden of proving any of the statements or warranties thus made untrue was on the defendant. For the appellant it is argued that in so instructing the jury the court erred. In the recent case of *Northwestern Mutual Insurance Co. vs. Hazelett* (105 Ind., 126, a. c., 4 *Northeastern Reporter*, page 582), we had occasion to consider the question thus made. Following the decision in the case of *John Hancock Ins. Co. vs. Daly* (65 Ind., 6), and the other authorities cited, our conclusion was that the burden of proof in like cases was, as the court instructed, on the defendant.

The appellant also complains that the court erred in refusing to give an instruction asked on its behalf. Upon consideration of the instruction refused, and an examination of the concise and carefully prepared instructions given by the court of its own motion, it appears that there is nothing material to the case embraced in that refused which was not adequately covered by those given. There was therefore no error in the refusal of the court to give the instruction referred to.

Finally it is argued at great length and with much plausibility, that the motion for a new trial should have been sustained because the verdict was not sustained by sufficient evidence. Whatever view may be entertained as to the weight or preponderance of the evidence, it is not, as indeed it could not well be denied that there is some evidence which strongly tends to sustain the verdict. This being the case, the conclusion reached by the court and jury at the trial cannot be disturbed here. The judgment should be affirmed with costs.

Judgment affirmed.

SUPREME COURT OF IOWA.

DONNELLY

vs.

CEDAR RAPIDS INS. CO.*)

The application was signed in blank by the insured and afterwards filled up by the soliciting agent who was furnished with blank applications by the company. The application was a warranty and according to the statute of Iowa a copy was indorsed on the policy. The agent had no power to bind the company by contract.

Held, That the insured was not responsible for false answers in the application.

DEACON & SMITH, *for Appellant*.

WOLF & LANDT and PIATT & CARR, *for Appellee*.

SKEEVERS, J.

The property insured consisted of a house, and certain personal property therein. The application for the policy, which was signed by the plaintiff, contained certain statements which were made warranties, and among which were the following : That the house was of the cash value of \$3,000, and that it was built in 1872; and certain additions thereto were constructed in 1880; and that there was \$500 insurance in another company on the personal property. The jury found specially that the value of the house was \$2,000, and that it was originally constructed in 1844, and rebuilt in 1865 or 1866, and the additions at a later date. It is not claimed there was any insurance in another company. Under these findings, it must be conceded that the foregoing statements were false. The jury further found specially that the plaintiff signed "the application in blank, and left it with the agent, Hersey," and that the latter filled "up the application, and wrote out the answers to the questions con-

* Decision rendered, June 21, 1886.

tained therein, basing the same on his own investigation and knowledge." The only evidence tending to show the power and authority of the agent was contained in the certificate of agency; and that empowered him to "solicit applications for insurance, * * * and forward the same, together with the entire consideration therefor, whether in notes or money, to the secretary of the company."

1. Counsel for appellant insist that the application is a part of the contract, and that, as it is in writing, any evidence which tended to contradict or vary it in any material respect was inadmissible; and it is further contended that, as the statements in the application are false, the plaintiff cannot recover. On the other hand, counsel for the appellee contend that the plaintiff is not bound by false statements in the application, for the reason that he never made them; but that, as to the defendant, they must be regarded as true, because they were written and made by its own agent, when acting within the apparent scope of the authority with which he was vested.

It will be conceded that the agent was a soliciting agent only, and that he had no power to bind the defendant by any contract he might make. But he made no contract. All that he did was to solicit insurance, and fill up a blank application furnished him by the company. Where an insurance company appoints an agent to solicit insurance, and furnishes him with blank applications, it must be assumed that he is vested with the power to fill up the application in accordance with the information furnished him by the applicant; and such is the usual practice. For this purpose he is the agent of the company, and if instead of obtaining the requisite information from the applicant, he obtains it from others, or fills up the application in accordance with his own knowledge and information, and thereon a policy is issued and delivered by the company, and the premium paid by the applicant, the company is bound by the statements in the application, and the insured is not, in the absence of fraud. It will be conceded that the defendant, when it issued the policy, believed that the plaintiff had furnished the information contained in the application, and that if it had known the facts, it would not have entered into the contract of insurance. But this is immaterial, because the deception was practiced by its own agent, and not by the plaintiff. The foregoing views are sustained by *Bartholomew vs. Merchants' Ins. Co.*, 25 Iowa, 507; *Hingston vs. Aetna Ins. Co.*, 42 Iowa, 46; and *Boetcher vs. Hawkeye Ins. Co.*, 47 Iowa, 254.

Counsel are mistaken in the assumption that parol evidence was introduced for the purpose of contradicting the written contract. The force and effect of the statements in the application are in no respect impaired, but, under the circumstances disclosed in evidence, the defendant is estopped from setting up their falsity as a defense to this action. It therefore follows that the instructions asked by the defendant were properly refused, and those given by the court bearing on the question under consideration we deem to be substantially correct.

2. We understand it to be insisted the evidence shows that the application was, at least partially, filled up by the agent in the presence of the plaintiff and in accordance with information furnished by him, and that, therefore, the finding of the jury is against the evidence in this respect. We have read the evidence with care, and deem it sufficient to say that we cannot interfere with the special findings. Section 2 of chapter 211 of the Laws of 1880 (Miller's Code, 299) provides, when any policy of insurance is issued or renewed, the company shall indorse thereon a true copy of the application, but that the omission to do so shall not render the policy invalid. If, however, the company neglects to do so, it shall be precluded from pleading or proving such application, or the falsity thereof; and the assured shall not be required, in order to recover, to plead or prove such application, but may do so at his option.

A copy of the application was attached to the policy in question, and therefore counsel for the appellant insist that the plaintiff was bound to know what representations were contained in the application; and as the same were false, and as he failed to notify the company of such falsity, that he is now estopped from relying on the fact that he signed the application in blank, and had no knowledge of the representations therein made. In our opinion, the statute should not be so construed, for the reason that, in order to recover, the assured is not required to prove that the statements therein contained are true. This being so, he was not required, nor had he any occasion, to examine the copy of the application indorsed on the policy.

The view taken of this case renders it unnecessary to consider several errors discussed by counsel, and, in our opinion, the plaintiff, under the special findings of the jury, was clearly entitled to recover, and no prejudicial error was committed by the court.

Affirmed.

SUPREME COURT OF VERMONT.

FEBRUARY TERM, 1886.

STATE

vs.

HIRAM L. HOVER.* }

An information under the statute,—No. 46 Sec. 3, Acts of 1884; R. L. Sec. 8,615,—charging an agent with receiving risks for insurance in behalf of a foreign insurance company, which has not complied with the statute, is bad on demurrer, unless the name assured is alleged.

Information filed by the State's attorney in the municipal court for the village of Bennington, July, 1885. The respondent filed a demurrer, which was overruled. It was alleged in the information that the respondent "did solicit or receive a risk or application for insurance, as agent for the American Mutual Life and Accident Association of South Bend in the State of Indiana, a corporation or insurance company, established by the laws of the State of Indiana, and not authorized to do business in the State of Vermont, and did then and there receive money or value for such insurance by the said American Mutual Life and Accident Association, contrary to the form, force and effect," etc.

Section 3 of the acts of 1884, is, "If any person as agent for an insurance * * * company, which has not complied with the requirements of section one of this act, shall solicit or receive a risk or application for insurance, or receives money or value for such insur-

* Opinion filed, May 22, 1886.—Reported by John H. Senter, of the Montpelier Bar.

ance by such company * * * * he shall be subject to a fine of not less than one hundred dollars."

STATE'S ATTORNEY, for the State.

In indictments and complaints for misdemeanors created by statute it is sufficient to charge the offense in the words of the statute: *State vs. Paddock*, 24 Vt., 315. The information sets forth the offense with sufficient strictness and certainty, and the respondent was not, as a matter of legal right, entitled to any further specification of the crime for which he was tried: *State vs. Bridgman*, 49 Vt., 202. Again, if the respondent had any doubt as to what the particular charge was against him the court would have ordered a more minute specification as to what particular offenses were relied upon, so that he would be in no wise harmed or misled.

The respondent on hearing before the municipal court did not indicate the defect complained of. Had he done so the defect, if any such there was, would have been promptly remedied.

J. G. MARTIN and J. C. BAKER, for the Respondent.

This statute imposes a penalty of from \$100 to \$500 for soliciting or receiving a risk or application for insurance under circumstances set forth in the statute. To solicit a risk is an offense. To receive an application is a distinct offense. Either of these calls for punishment denounced by the statute. The information alleges that this respondent did one or the other of these unlawful things, but it does not in any manner indicate which, and the information is insufficient for that cause: 1 Bish. Cr. Proc., Secs. 325, 535; *State vs. Moran*, 40 Me., 129; *State vs. Woodward*, 25 Vt., 616. The information is wholly silent as to whether the American Mutual Life and Accident Association had complied with Sec. 1 of said act. The very first clause of Sec. 3, of No. 46, of the acts of 1884, makes the unlawfulness of the thing done depend upon this fact, and it must be alleged or the information is insufficient: 1 Bish. Cr. Proc., Secs., 513, a, 631, et seq.; *State vs. Day*, 3 Vt., 138; *State vs. Northfield*, 13 Vt., 565.

TARR, J.

The information is defective in not alleging the name of the person from whom the respondent solicited or received the risk or application for insurance. It is like a complaint charging an assault with-

out naming the person assaulted, or an adultery without naming the *particeps criminis*. The respondent should know what act he is called upon to defend, the rules of good pleading required that it should be stated in the information. There is no occasion to pass upon any other question in the case.

Exceptions and demurrer sustained. Information adjudged insufficient. Judgment reversed and respondent discharged.

SUPREME COURT OF PENNSYLVANIA.

Error to the Common Pleas of Dauphin County.

MUTUAL FIRE INS. CO. }

vs.

WAGNER.* }

A direct pecuniary interest in a building that may be damaged by the destruction of the building by fire, constitutes an insurable interest.

Wagner purchased by articles, a farm from Bacastow, who held his title through J. Corpman, who, it seems, had borrowed money from Bacastow. A deed for the farm was given by Corpman to Bacastow April 6, 1868, and an agreement was at the same time made that Corpman should occupy the property as lessee at a stipulated rent per annum, and pay also a certain portion of the principal sum of his indebtedness until the whole debt was paid, when Bacastow was to reconvey the farm to Corpman. In 1869 Ballou & Scott obtained judgment against Corpman, and the farm was sold, 25th August, 1870, by virtue of an execution issued thereon, William S. Corpman purchasing it. On July 5, 1870, after the sheriff's sale, but before the acknowledgment of the sheriff's deed, Wagner, having paid part of the purchase-money and being in possession but not yet having received his deed, secured a policy of insurance on

* Decision rendered, October 5, 1885.—From *Eastern Reporter*.

the farm house. April 21, 1873, Bacastow and Wagner agreed in writing as follows:

Witnesseth, That the said Daniel Wagner has leased from said John Bacastow all that certain messuage, tenement, or tract of land with the appurtenances, situated in West Hanover township, Dauphin County, adjoining lands of J. Hetterich and others, now in possession Daniel Wagner, for the term of one year from the 1st day of April, last past, to the 1st day of April, 1874, for which said Wagner agrees to pay to said Bacastow a rent of \$160 in half-yearly payments, viz.: one-half on the 1st day of October next, and the other half on the 1st day of April, 1874, when said lease expireth; and said D. Wagner agrees to pay all taxes accruing on said land in said year, and to keep up all repairs and make the fences and lime the land all in the bargain; and on leaving said land he is to put as much of all kinds of grain as there was out when he got it, of which grain he is to have the one-half, but he is to cut and thrash and haul it away not over five miles. And said D. Wagner is not to cut any wood of said land unless said Bacastow is agreed to have it cut, and said Wagner is not to take any hay, straw, or corn fodder or manure from said land. And it is further agreed by and between the said parties that if said D. Wagner can pay to said Bacastow \$500 and the rent on the 1st day of April, 1874, then said Wagner is to have possession of said premises for another year, on the same condition, and so on from year to year, until said Wagner has paid to said Bacastow the sum of \$2,000 and the rent further agreed on; then said Bacastow is to convey said property to said Wagner at said Wagner's expenses for deeds, etc., and if said Wagner cannot comply and fulfill said agreement on the 1st day of April, 1874, then said Daniel Wagner is to give up quiet and peaceable possession of said premises, on the 1st day of April, 1874, without further notice.

In March, 1874, the building was destroyed by fire. Wagner then brought an action to recover the amount of the insurance policy. The company disputed his claim, alleging that he had fired the building and also alleging a want of an insurable interest.

JOSIAH FUNCK & SON and LEVI B. ALRICKS, *for Plaintiff in Error.*
FLEMING & MCCARROLL, *for Defendant in Error.*

PER CURIAM.

We discover no sufficient cause for reversing this judgment. The jury has found that the plaintiff below did not burn the build-

ings. It is clear under the authorities that he had an insurable interest in the property. He had a direct pecuniary interest therein so as to be damaged by its destruction. This constitutes an insurable interest: *Strong vs. Manuf. Ins. Co.*, 10 Pick., 40; *Wood Ins.*, § 266; *Williams vs. Ins. Co.*, 107 Mass., 327; *Coursin vs. Penn. Ins. Co.*, 46 Penn. St., 323; *Far. and Mech. Ins. Co. vs. Meeker*, 10 W. N. C., 306., The case was well submitted.

Judgment affirmed.

COURT OF APPEALS OF NEW YORK.

WISE, *Respondent*,

vs.

PHOENIX FIRE INS. CO., *Appellant*.*

The insured as a witness may refresh her memory by reference to the schedule attached to the proofs of loss made up from actual knowledge, where the items are numerous.

A request for special finding as to want of information concerning the risk on the part of the company was properly refused where such information was not material to the issue.

CHAR. A. FOWLER, *for Appellant*.

PRESTON & CHIPP, *for Respondent*.

PER CURIAM.

There was no error in permitting the plaintiff, while under examination as a witness, to refer to the schedule attached to the proof of loss, for the purpose of refreshing her memory: *Howard vs. McDonough*, 77 N. Y., 592. This schedule, which was made up a few days after the fire, was sworn to be correct both as to items and values, and to be made up from actual knowledge. Where the items are numerous, and, therefore, difficult to be retained in the memory, the court, in its discretion, may permit a reference to memoranda, proven to be correct both as to items and their values. To hold otherwise might make a party's rights dependent upon unusual strength of memory.

The plaintiff was subjected to an examination as to her loss in accordance with the terms of her policy, and the defendant requested

* Decision rendered, January 19, 1886.

a finding that "at the time of such examination the defendant had no knowledge that plaintiff had not during the summer and fall of 1881 put any new furniture in her house," which was refused. The materiality of this request is taken away by the finding that the policy was not issued upon the faith of any representation by plaintiff that she had or intended to put in new furniture, and is further answered by the fact that before the examination under the policy, the defendants' agent was told by her the age and condition of all the items of furniture and went through with her a discussion of the entire list.

The question raised as to the lace curtains, velvet cloak, and lambrequins was substantially a question of fact. We find no error in the record.

The judgment should be affirmed, with costs.

All concurred, except Miller, J., absent.

Judgment affirmed.

SUPREME COURT OF GEORGIA.

SMITH

vs.

HEAD.

A wife's policy is her separate property, and under the Georgia code cannot be transferred to a creditor by her to secure her husband's debt, nor will her ratification of the transfer after her husband's death give it validity.

The court say after reciting the facts: A married woman's property cannot be assigned by her or conveyed by her in any form to pay her husband's debts. This policy, payable at her husband's death, is her property. The policy is payable to her then. It is as much hers as any property can be,—as any note payable in the future, or any fee in remainder, or any property not to be used by her till a certain event transpires. Therefore when, in 1876, she made this transfer, attested by her husband as a witness, it was absolutely void under the words of our statute: Code, § 1,783. That section declares that "any sale of her separate estate, made to a creditor of her husband in extinguishment of his debts, shall be absolutely void," and that "she cannot bind her separate estate, . . . by any assumption of the debts of her husband." This is a sale of her property to pay his debt to Smith, administrator of Gregg. It is absolutely void. The record does not show plainly that her husband was dead when she ratified this transfer, made in 1876, by another in 1879, but from the context in the pleadings we suppose he was. It is immaterial. The last ratification or transfer was nudum pactum. It is agreed that no consideration of value passed to her, but it was to pay his debts. Therefore it, the second one, being without any

binding consideration,—the ratification of a void thing or its renewal being void, and no other valid consideration, it being agreed, being given for the transfer of 1879,—it is as void as that in the lifetime of the husband to pay his debts.

But another statute controls the case. Section 2,820 enacts that “the assured may direct the money to be paid to his personal representatives, or to his widow, or to his children, or to his assignees; and upon such direction, given and assented to by the insurer, no other person can defeat the same. But the assignment is good without such assent.” This is too plain for argument. The assured directed the money paid to his wife. He made no change. No other person can. That the section is codified from 13 Ga., 365, we have no doubt; but the deduction drawn from that fact by the very able and diligent counsel for plaintiff in error, that an expression of Chief Justice Lumpkin, intimating that creditors might still interpose to defeat the wife’s right, should be considered as part of the section, or as modifying it in favor of creditors, so far from being legitimately drawn from its omission, strengthens the force of the statute as it must mean from plain words. Judge Lumpkin’s remark was obiter, and the fact that the cream of the decision and opinion is embodied in the code and this remark left out, shows that the opinion of the court was codified and the obiter was not; because the general assembly, and afterwards the constitution, enacted the opinion on the points in issue as law, but passed by the obiter as not law. Nor could the codifiers well incorporate in the code any remark outside of the points in the case as law, under their commission; the opinion on the facts and issues made, they could, and did; and what they did the legislature and convention made law as laid down in § 2,820 of the code. We conclude that in any view of the case, under our own law, the money is Mrs. Head’s; and we deem it unnecessary to follow counsel into the learning and elaboration of other points made upon text-books and adjudications under other laws and by other courts. Nor is it necessary to go into the means the assured used to pay the premiums, or his solvency or insolvency, as affecting creditors’ rights; because our statute (Code, § 1,820) allows no person to defeat the direction the assured gave to the payment, that is to whom it should be made at his death.

COURT OF APPEALS OF NEW YORK.

ADELINE R. EDINGTON, *Appellant*,

vs.

ÆTNA LIFE INS. CO., *Respondent*.

In response to the question in the application, whether the applicant had ever applied for insurance in another company and had been unsuccessful, the answer was in the negative, whereas an application to such other company was signed and delivered to an agent authorized to receive it, and was not successful.

Held, that the response was materially false and vitiated the policy, and it was of no consequence whether or not the prior application had never been submitted to the company, but had been acted on without authority by its agent and medical examiner.

F. O. MASON, *for Appellant*.JOHN GILLETTE, JR., *for Respondent*.

FINCH, J.

The judgment in favor of the defendant has been affirmed by the general term upon the ground that one defense pleaded was established without contradiction, and formed a complete bar to the plaintiff's recovery. Upon a previous appeal to this court, and on the same state of facts as it respects the defense referred to, that result was reached, although a majority of the court placed their concurrence upon a different ground (77 N. Y., 564). Undoubtedly, the appellant had the right to deem the question open in this court, and seek to convince us that the doctrine of the prevailing opinion was incorrect; but we are not convinced. Windsor was the agent of the Mutual Benefit Insurance Co., and as such agent was authorized to receive applications for insurance. He was furnished with blank forms, which, when filled out and signed by the appli-

* Decision rendered, November 24, 1885.

cant and delivered to the agent, constituted and completed the application for insurance. Everything that followed the application was an element of its result. Such an application Diefendorf signed and delivered to the agent. When that was done, he had made an application to the Mutual Benefit Company for insurance. No other act of his was needed. What the company, through its officers and agents might do or omit to do with it, constituted the result of the application as to which a truthful answer was required. A false answer was given. The application was made and was not successful. If the truth had been told, the present policy would never have been issued. The test is not whether Windsor or the medical examiner had authority to finally reject the application, They were utterly without authority to dispose of it, and so the company never acted upon it, at least there was an application to the company which was not successful, and did not end in an accepted insurance. Our present consideration of the question leads us to an approval of the views expressed on the former appeal.

The judgment should be affirmed with costs.

All concur, except Danforth J., not sitting

LOWER COURT DECISION.

SOLE OWNERSHIP.—VACANCY IN CASE OF FACTORY

Court of Appeals of Louisiana.

BRIDGET TAGUE

vs.

ROYAL INS. CO., QUEEN INS. CO., FIRE INS. ASS'N, COMMERCIAL
UNION ASS'Y CO., and PHENIX INS. CO. OF BROOKLYN.*

Plaintiff, after taking a conveyance for the whole of certain movable property in a building owned by her and giving promissory notes for the same, afterwards entered into a compact before a notary with the seller, in which she accepted from the seller one-fourth part of the same movable property in consideration of debts due, and gave a full acquittance. The business was afterwards managed by a third party in behalf of the plaintiff, but there was no accounting and no purchasing in plaintiff's name.

Held, That the ownership of plaintiff was only an undivided interest, and where the policy provided that it should be void if the title was not a sole ownership, the insurance was forfeited.

Held, That where the business of manufacturing had ceased for five months, without evidence of any intention to resume, it had ceased operations within the meaning of the policy.

SANSUM, REFEREE.

On the 8th day of March, 1884, the plaintiff was the owner of a building known as 62 and 64 Perdido Street, in New Orleans, and one W. P. Ames was the owner of certain movable things, namely, machinery, belting, shafting, tools, engine, lubricator, boilers, hardware, furniture, lumber, and an iron safe—all in the building above men-

* Decision rendered, July 1886. Decision final. The two judges being unable to agree, O. B. Sansum Esq., an attorney with the qualification of judge, was according to the law called in, and decided the case as referee.

tioned. Ames had possession of the building and the things mentioned. He used, employed, and occupied the building and the things named in the business of manufacturing household furniture. Ames seems to have expended in his business money he had received as the tutor of a minor, and he was also indebted to the plaintiff in the sum of \$1,500, with interest from July, 1883.

At the date above mentioned Ames signed a paper conveying all the movable things mentioned to the plaintiff for a consideration stated at \$7,401.74. No money passed from plaintiff to Ames, but four promissory notes, each for \$1,850.44, payable in one, two, three, and four years respectively, were signed and delivered by plaintiff to Ames.

Ames surrendered one of these promissory notes to plaintiff, in satisfaction of the debt due her. But subsequently, on the 17th of the same month, Ames and the plaintiff appeared before John R. Legier, a notary public in this city, and there entered into a compact in which they both declared that Ames is then indebted to the plaintiff in the sum of \$1,500; that the plaintiff had demanded a settlement of her claim, and that Ames being unable to pay it has proposed to make to her a dation en paiement of certain personal property, to wit, the movable things above mentioned; the notarial act then vests in the plaintiff an undivided fourth part of all the movable property above mentioned, and she accepts it, acknowledging herself satisfied, and gives to Ames a full, absolute, and complete acquittance and discharge of the debt mentioned. The notarial act proceeds in the words following:—

“The said Wm. P. Ames, in consideration of said acquittance and discharge, hereby transfers and delivers the one undivided fourth part of said furniture factory unto the said Miss Bridget Tague, who hereby accepts and acknowledges herself in possession thereof.”

The plaintiff never took actual possession of the premises, but one Boyle, a blacksmith, carrying on the business of shoeing horses in the next house to the factory, managed the business for the plaintiff.

But there is nothing in the record tending to show that materials needed for carrying on the business were bought in the plaintiff's name, or that furniture made in the factory was sold in her name.

Boyle died July 21, 1884. Up to that date he had rendered no accounts of the business to plaintiff, and she never asked him for an accounting. Being asked at the trial how much money he had paid

her, she answered. "Well, I cannot tell you. I never kept account. I cannot exactly say how much. I suppose he paid me about \$300, or \$250."

Question—The balance he kept for himself?

! Answer—I suppose he paid the bills that came in. He paid for what he bought.

And being asked at the trial what was done with the factory from the time Boyle died to Oct. 1, 1884, when she rented it to Ames, she announced. "Well, I left it there. I did nothing with it."

Q.—Was the place idle?

A.—Yes, sir, idle.

Q.—No one occupying it, no one working it?

A.—No sir, it was idle.

Q.—Then from the 21st or 22d of July, 1884, until Oct. 1, 1884, your furniture factory was entirely idle and vacant?

A.—No, sir, it was not vacant, there was furniture in there.

Q.—There was no workman in there?

A.—I don't believe there was any work done in there. I can't say. I can't say from that time there was no work done in it. Schwartz, defendant's witness, testified "it was closed in October, 1884, if I am not mistaken. Absolutely closed, but there were two parties working up stairs."

Q.—What were they doing.

A.—I cannot say. Ames testified, I had rented it for two or three months. I believe I was paying \$50 a month.

Q.—What were you doing there?

A.—I was repairing some of the stuff I had there—furniture.

The building and movable property mentioned were consumed by fire Jan. 1, 1885.

March 13, 1884, insurance against fire was made for the plaintiff on the movable things mentioned, to the amount of \$5,000, by the insurance companies hereinafter named, as follows: The Royal, the Queen, the Fire Insurance Association, the Commercial Union Assurance Company, all of England, and by the Phenix Insurance Company of Brooklyn, each for \$1,000 as follows: \$3,000 on machinery belting, shafting, pulleys, and appurtenances; \$200 on tools and thirteen cabinet benches; \$400 on engine and lubricator; \$600 on furniture; \$350 on boiler and chimney; \$200 on lumber; \$75 on hardware and iron safe; \$75 on office furniture. "All contained in the two-story, frame, slated building, situated Nos. 62 and 64 Perdido Street, south side, between Penn and Dryades Streets, New Orleans, La., occupied as a furniture factory."

The policies by the Phenix, the Commercial Union, the Fire Insurance Association and the Queen, stipulate, among other things, as follows: "Or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever without the insured giving notice to the company and obtaining consent therefor as provided; or if it be a manufacturing establishment operating at night, or if it shall cease to be operated, * * * this policy shall be void."

The words "or if it shall cease to be operated" are not found in the policy issued by the Royal Insurance Company. All the policies stipulate, "or if the property be sold or transferred, or any change take place in the title or possession, whether by legal process or judicial decree or voluntary transfer or conveyance * * * this policy shall be void." "Or, if the assured be not the sole and unconditional owner of the property * * * it must be so represented to the company, otherwise the policy shall be void."

The defenses pleaded to the action are:—

First. That the proofs of the loss are fraudulently false.

Second. That the risk taken by the defendants constituted a manufacturing establishment; that it ceased to be operated, contrary to the stipulation cited.

Third. That the plaintiff had not the entire, sole, and unconditional ownership of the property insured; that she had only an undivided interest in it, contrary to the stipulation cited.

The first defense, namely, that the preliminary proofs of loss are false and fraudulent, must be rejected, because the evidence does not

satisfy me that the statements set forth in them, though untrue in some respects, were made with any intent to cheat and defraud the defendants. The plaintiff is an illiterate woman—she seems to have done nothing in the making of the preliminary proofs, excepting signing them and making oath to them in the usual formal way. From what appears on this subject I cannot infer any intention to cheat and defraud the insurers of the property.

The second defense, namely, that the plaintiff was not the sole owner of the things insured, presents an inquiry not free from difficulty.

The plaintiff founds her right to judgment upon contracts which declare, "If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of property * * * it must be so represented to the company and so expressed in the written part of the policy, otherwise this policy shall be void."

Nothing appears upon the face of the policies indicating that plaintiff is not the sole owner of the things insured. In all the cases on this subject the courts declare the plaintiff must aver and prove a sole, absolute title to the thing insured. But plaintiff does not aver in her petition that she has any interest whatsoever in the things insured. If there be no averment of interest in the plaintiff's declaration no ground of action is shown, because public policy forbids insurance for account of persons who have no interest in the things insured; and, if there be no averment of interest the law presumes there is no interest: Per Lord Mansfield, *Cousins vs. Nantes*, 3 Taunton, 513.

If plaintiff had averred an undivided fourth, or any undivided interest, large or small, in the things insured, the defendants would be entitled to judgment on the ground that the policies which are made part of the record expressly prohibit insurance on an undivided interest, unless it be expressly stated; the record in that event would show "no cause of action."

I declare, as a matter of law, before the plaintiff can recover upon any of the policies in suit, she must prove a sole ownership in the things insured, and that showing an ownership in herself and another jointly defeats her right to recover.

In support of her ownership she shows a conveyance, dated March 8, 1884, from Ames to herself, and her four promissory notes, each for \$1,850.44, payable in one two, three, and four years, respectively, to the seller (Ames), and a surrender by Ames of one of the promissory notes as payment of his debt of \$1,500 and interest from July,

1883. If her evidence rested here I should have no difficulty in sustaining her title as a sole and absolute title. But the case shows that nine days thereafter, namely the 17th of March, 1884, Ames and the plaintiff appeared before a notary public, and both declared that the fifteen-hundred-dollar debt, for which the promissory note of \$1,850.44 had been surrendered, was still due and unpaid; that plaintiff demanded payment thereof, and that Ames being unable to pay it, then made, under the law of Louisiana, a *dation en paiement* thereof by surrendering and abandoning to plaintiff an undivided one-fourth part of the things insured, and in consideration thereof the plaintiff acquits, releases, and discharges Ames from the said debt of \$1,500, with interest from July, 1883.

Coupling this solemn declaration with plaintiff's conduct and dealings with the property—with the fact that she fails to show any active participation in directing and managing the business of the factory—that she fails to show that the furniture made in the factory after March 8 was sold in her name, that she fails to show money and supplies for the factory were procured in her name, that she demanded no accounting from Boyle while he lived, and that he made none to her—that Ames resumed possession of the factory after Boyle's death and cannot remember even what rent he agreed to pay for it, I am unable to conceive how any fair-minded man can reach the conclusion that plaintiff's ownership in the things insured was a sole, absolute ownership.

I am driven to the conclusion that, for reasons best known to Ames and the plaintiff, between March 8 and 14, they deemed it best to treat the debt due to her as still unpaid and outstanding, and that in satisfaction thereof Ames should make and that she should receive only an undivided fourth of the property, and that she should take that undivided fourth by a valid instrument before a notary public, and that Ames should receive a valid discharge from the debt in the same way, and to effect this purpose both appeared before the notary public and passed the act which is in evidence, and which is dated March 17, 1884.

If plaintiff was owner of the whole under the conveyance of March 8, 1884, why did she accept an undivided fourth part of it from Ames under this instrument? If she was owner of the whole, how could Ames give, and how could she accept from Ames, that which was her own? Therefore the court is bound to declare as a matter of law, the plaintiff has failed to show a sole ownership in and to the things insured. Counsel for the plaintiff asks: What becomes of

the plaintiff's promissory notes, given by her as consideration for the transfer? The answer is: When she received the one undivided fourth part of the property insured she ought to have taken care to receive her promissory notes, and her neglect in that respect does not trouble or concern the court.

The other defense, namely, that the risk assumed by the defendants was that of a manufacturing establishment, and that it ceased to operate remains to be decided.

As to the Royal Insurance Company, this defense fails, because the policy of that company exhibits no prohibition in that respect; but the policies of the other defendants contain the covenant in the words following: "Or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever without the consent of this company indorsed hereon, or if it be a manufacturing establishment running in whole or in part over and extra time or running at night, or if it shall cease to be operated, without special agreement indorsed on this policy, * * * then and in every such case this policy is void."

I find no difficulty in construing this stipulation. There is no room for doubt. Every writing must be construed by the context and the court may even look at surrounding circumstances to ascertain the intention of the parties; the court will even supply words in proper cases.

The words, "if it be a manufacturing establishment," refer to the noun "risk," found in the beginning of the stipulation, therefore that stipulation must read, "if the risk be a manufacturing establishment, running in whole or in part, etc., or if it shall cease to be operated the policy shall be void. In other words, if the risk be a manufacturing establishment, and it cease operations as such, the policy is void." If the insurer have notice of the fact that the establishment has ceased operations, and makes no objection, the stipulation is waived; if notice be not given the policy is void.

The risk assumed by the defendants is that of a furniture factory, because the policy reads, "All contained in the building, etc., occupied as a furniture factory."

Does the evidence show that it had ceased to be operated? plaintiff's counsel argues. It shows, at most, only a temporary suspension of work. The fact remains, however, that Boyle died July 21, 1884, and from that time to the time the fire happened the factory had not been used as factory.

The plaintiff testified: "Well, I left it there. It was idle. It was

not vacant, there was furniture in there. I don't believe there was any work done in there. I can't say from that time there was no work done in there."

There is no evidence in the record tending to show an intention to resume operations. Renting it to Ames, on terms he cannot remember, or allowing him to repair his old furniture in it, do not show a temporary suspension of operations.

I find, as a matter of fact, it had ceased to be operated as a furniture factory, and that it had not been operated as such from July 21 to the end of December, 1884.

For the reasons above stated, I am bound to concur with the opinion written by Mr. Justice Kelley—that plaintiff's suit must be dismissed; that she be condemned to pay all costs, and that defendants have judgment for costs.

THE INSURANCE LAW JOURNAL.

VOL. XV.

OCTOBER, 1886.

No. 10

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF COLORADO.

Appeal from the District Court of Larimer County.

DENVER FIRE INS. CO. }

vs. }

McCLELLAND.*

- A corporation cannot avail itself of the defense of ultra vires when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract.
- A corporation organized for the purpose of insuring against loss by fire is estopped to deny its liability on a contract of insurance against loss by hail, when the same has been fully performed by the insured, who, in good faith, dealt with the company under the belief that it had authority to enter into such contract.

* Opinion filed, January 11, 1886.—From *West Coast Reporter*.
VOL. XV.—46.

The opinion states the facts.

STALLCUP, LUTHE & SHAFFROTH, and TELLER & ORAHOOD, *for the Appellant.*

NORVILLE & CLARK, and T. M. ROBINSON, *for the Appellee.*

STONE, J.

The sole question in this case is whether the appellant can avail itself of the ultra vires of the contract upon which its liability, if any, arises as a defense to the action. The complaint of appellee, the plaintiff below, is as follows:—

Plaintiff states that the defendant is a corporation duly organized and incorporated under the laws of the State of Colorado, and doing business in Larimer County in the State of Colorado as a general fire and hail insurance company.

“Plaintiff, for cause of action, states: 1. That on or about the twelfth day of June, 1882, plaintiff was the owner of certain growing crops, situate on the east half of the north-east quarter and the north half of the south-east half of section 2, township 6, range 69 west, and south-west quarter section 35, township 7, range 69 west, in Larimer County, State of Colorado.

“2. That on said twelfth day of June, 1882, the defendant in its said capacity of an insurance company contracted and agreed with plaintiff for and in consideration of the sum of sixty-one dollars and three cents, three dollars of which said sum was then and there paid by plaintiff to defendant, and the balance of which said sum, amounting to fifty-eight dollars and three cents, was then and there evidenced by a promissory note made due and payable on the first day of November, 1882, executed and delivered by plaintiff to defendant, and by defendant accepted to insure the plaintiff in the sum of one thousand nine hundred and thirty-five dollars against loss or damage to the aforesaid growing crop by reason of injury to or destruction thereof by hail, and did then and there by its certain policy of insurance dated on the said twelfth day of June, 1882, duly signed by Archie C. Fisk, its president, and R. P. Goddard, its secretary, and countersigned by Jesse Harris, its duly authorized agent, and by defendant delivered to plaintiff, insure plaintiff for the term of one year from the date of said policy against loss or damage to his said growing crops by reason of the destruction thereof or any injury thereto that might be caused by hail, and did by the terms and stipulations contained in said policy, and for and in consideration of the said sum of sixty-one dollars and three cents, promise and agree to make

good unto the plaintiff all such immediate loss or damage as might occur by reason of hail to the aforesaid growing crops from the said twelfth day of June, 1882, to the twelfth day of June, 1883, in the sum of one thousand nine hundred and thirty-five dollars, to be paid sixty days after due notice and proof of such loss or damage.

"3. That said insurance covered and applied to plaintiff's said growing crops as follows, to wit: On sixty-five acres of wheat, not to exceed, in case of loss, fifteen dollars per acre, or nine hundred and seventy-five dollars. On six acres of oats, not to exceed, in case of loss, fifteen dollars per acre, or ninety dollars. On one hundred and twenty acres of wheat, not to exceed, in case of loss, six dollars per acre, or seven hundred and twenty dollars. On one acre of strawberries, not to exceed, in case of loss, one hundred and fifty dollars per acre.

"4. That by the terms and conditions of said policy of insurance, the defendant contracted and agreed that in the event of injury, loss, or damage to plaintiff's said growing crops or any part thereof, not amounting to a total destruction thereof, such damage or injury should be appraised by disinterested and competent persons to be mutually agreed upon by plaintiff and defendant, until the amount of such damages should be agreed upon between the plaintiff and defendant.

"5. That on the nineteenth day of June, 1882, plaintiff's said growing crops were injured and damaged by hail to the amount of one thousand five hundred dollars, and the plaintiff sustained damage and loss thereby in respect of his said growing crops in the said sum of one thousand five hundred dollars.

"6. That on the nineteenth day of June, 1882, plaintiff gave defendant due notice of plaintiff's said loss and damage.

"7. That on the twenty-second day of June, 1882, plaintiff rendered to defendant a particular account of said loss and damage verified by the affidavit of plaintiff.

"8. That said crops not being totally destroyed by said hail, and the plaintiff and defendant not being able to agree upon the amount of said damages so sustained by plaintiff, the plaintiff and defendant mutually agreed upon W. F. Watrous and Charles Warren, two disinterested and competent persons as appraisers to assess and appraise the amount of damages and loss so sustained by plaintiff.

"9. That the said W. F. Watrous and Charles Warren did then and there, on the twenty-second day of June, 1882, appraise the damage and injury to plaintiff's said crops caused by the injury

thereto by hail as aforesaid at the sum of one thousand five hundred dollars as follows, to wit:—

“To plaintiff’s said sixty-five acres of wheat hereinbefore mentioned as insured for nine hundred and seventy-five dollars, said appraisers assessed and appraised the damages at the sum of seven hundred and eighty dollars. To plaintiff’s said six acres of oats hereinbefore mentioned as insured at and for ninety dollars, said appraisers assessed and appraised the damages at ninety dollars. To plaintiff’s said one hundred and twenty acres of wheat hereinbefore mentioned as insured for seven hundred and twenty dollars, said appraisers assessed and appraised the damages at four hundred and eighty dollars, and to plaintiff’s said one acre of strawberries hereinbefore mentioned as insured for one hundred and fifty dollars, said appraiser assessed and appraised the damages at one hundred and fifty dollars, which said appraisement represented the true damage and injury done to plaintiff’s said growing crops by said hail.”

“10. That said appraisers, on the twenty-second day of June, 1882, made out and delivered to defendant a statement or report in writing, verified by their affidavits, setting out in detail their said appraisement of the damages aforesaid as here averred and set forth.

“11. That more than sixty days have elapsed since the aforesaid notice and proof of plaintiff’s loss and damage were received by defendant at its office, and that defendant has wholly failed, neglected, and refused to pay plaintiff the said sum of one thousand five hundred dollars, or any part thereof, and has failed and refused to make good or pay plaintiff for his said loss and damage, or any part thereof.

“Wherefore plaintiff prays judgment for one thousand five hundred dollars, together with interest and costs of suit, and for general relief.”

The amended answer of the appellant company, the defendant below, “denies that on the nineteenth day of June, 1882, or at any other time, plaintiff’s growing crops were injured or damaged by hail to the amount of one thousand five hundred dollars, or any other amount, or that plaintiff sustained damage or loss thereby in respect of his growing crops in the said sum of one thousand five hundred dollars, or any other sum.

“Denies that the plaintiff and defendant mutually agreed upon W. F. Watrous and Charles Warren, or either of them, or any other person or persons, as appraisers to assess or appraise the amount of damage or loss so pretended to be sustained by plaintiff, or that said

pretended appraisers acted by any authority whatever, but avers that all and each part of said pretended appraisement and each and every act of said pretended appraisers in the behalf mentioned in said complaint were without authority, irregular, illegal, and void.

"Defendant for a second and separate defense to the complaint herein states that it is a corporation duly incorporated under and by virtue of the laws of the State of Colorado, and doing business in said county of Larimer; * * * that said articles of incorporation have never been amended; that said articles of incorporation were duly filed and recorded in the office of the secretary of State of Colorado on the twenty-sixth day of August, A. D. 1881, and were duly filed and recorded in the office of the county clerk and recorder in and for said Larimer County long before the twelfth day of June, A. D. 1882, and long before the alleged contract between plaintiff and defendant was made.

"Defendant further states that, by virtue of said articles of incorporation, neither the said the Denver Fire Insurance Company, its directors, stockholders, or officers, had or have any right, power, or authority, to enter into or make any contracts with plaintiff or any one by which said company could insure growing crops of any kind against loss or damage by hail, but that all and each of the several acts of the said the Denver Fire Insurance Company, its directors, stockholders, and officers which are alleged and set forth in the complaint herein in reference to the making of said alleged contract with plaintiff, and to the insurance and making of the alleged policy of insurance to plaintiff and all other acts with reference to the terms of the said policy, the alleged agreement to arbitrate any loss of plaintiff, and the alleged appointment and finding and appraisement of said alleged arbitrators, are absolutely null and void, each and every act being beyond the scope and power vested by the said articles of incorporation in defendant, its directors, stockholders, and officers.

"Defendant further states that it is willing to return all that it has received from plaintiff by reason of said alleged policy of insurance, to wit, three collars, and plaintiff's said promissory note for fifty-eight dollars and three cents. Wherefore defendant asks to be discharged with costs."

The articles of incorporation are set out in full in the foregoing answer. That portion which is material to the question before us, being as follows:—

"Know all men by these presents, that we, Archie C. Fisk, Samuel

S. Griswold, and Frederick Michel, residents of the State of Colorado, have associated ourselves together under the name and style of the Denver Fire Insurance Company, for the purpose of becoming a body corporate and politic under and by virtue of the laws of the State of Colorado, and in accordance with the laws of the said State. We hereby make, and execute, and acknowledge three hundred original certificates in writing of our intention to become a body corporate under and by virtue of said laws.

"1. The corporate name and style shall be the Denver Fire Insurance Company.

"2. The objects for which this company is formed are to become a body corporate and politic, with power to sue and be sued, to insure buildings of all kinds erected or in process of erection, goods, wares, and merchandise, machinery, mills, factories, smelters, foundries, machine-shops, breweries, and personal property of every description, whether in store, transit, or use, from loss or damage by fire, and generally do and transact all business necessary to effectually secure indemnity from loss or casualty by fire or lightning, and all other business transacted by fire insurance companies. To borrow and loan money, take mortgages, trust deeds, or other securities, and to pledge the property and franchise of the company, both real and personal, to acquire by purchase, leases, entry, grant, devise, or gift, or otherwise, real estate or other property, and to dispose of said property at pleasure, and to perform any and all lawful acts which the directors or stockholders may deem necessary for the successful prosecution of the business of the company."

Appellee demurred to this second defense. The demurrer was sustained, and the appellant electing to stand by the answer, the damages were assessed by a jury who returned a verdict for one thousand two hundred and sixty-five dollars and fifty cents, and judgment therefor was thereupon rendered by the court. The errors assigned go to the sustaining of the said demurrer and judgment rendered.

The authorities cited on both sides of the case are very numerous. Questions touching the ultra vires of corporations have been before the courts of probably every State in some shape, and various phases of the question have been many times considered by the Federal courts, while standard text-books are full of research and discussion upon the entire subject. We have examined these authorities with care, but a review of them here would be unnecessary labor, since both the English and American authorities have been collated and

discussed fully in many of the leading cases cited by counsel in their briefs filed in the case. In respect to the precise question before us, there is apparently much conflict of opinion in the decision of the court, such conflict being in many cases apparent only, but in others squarely antagonistic. It is quite well settled as a general rule that a corporation possesses only such lawful powers as are expressly conferred by its charter, and such as are clearly incidental or impliedly requisite for carrying out the declared objects and purposes of its creation.

On the one hand, it is held by some authorities that acts of a corporation in excess of the powers limited by the foregoing rule are illegal, that any contract made in such excess of lawful authority is void and not enforceable, and that neither party to an action founded thereon is estopped to plead the *ultra vires* of the contract in bar of such action.

On the other hand it has come to be the settled doctrine of several States that a corporation may be estopped to deny its authority to enter into a contract which has been executed, and from which it has derived the benefit which it thereby sought. There seems to be a growing tendency to this doctrine in modern decisions in this country, and it is also supported by the authority of English cases.

As is said in *Parish vs. Wheeler*, 22 N. Y., 494, a leading case upon this subject in the United States: "The executed dealings of corporations must be allowed to stand for and against both parties where the plainest rules of good faith require.

Mr. Waterman, in his late excellent treatise upon the specific performance of contracts, says that it is now settled that a corporation cannot avail itself of the defense of *ultra vires*, when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract: Sec. 226. So if the other party has had the benefit of a contract fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation.

In the case before us the contract, as made by the parties, appears to have been fully executed on the part of the appellee, so far as his right of action when brought was effected by it. He had paid a small portion of money on the amount of the premium agreed to be paid and had given a promissory note for the balance. This was all he had agreed to do; all that had been exacted of him by the insurance company, and this he had performed. It matters not that the

note had not been paid, for it was not due when his right of action accrued and when he brought his suit.

It is not contended that the payment of the note was a condition precedent to his right of action against the company, since at the time of bringing the action the note lacked two months of maturity, and there was nothing to be done or performed by him under the contract. The performance already made by the appellee had been accepted by the appellant company, and so far as it was concerned, the execution of the note was the same as a cash payment in full of the amount; the company had the benefit thereof. It is argued on behalf of the appellant that the courts ought in all such cases to sustain the defense of *ultra vires*, here interposed, on the ground of public policy; that the public which confers the corporate powers upon such companies has an interest in the protection of innocent stockholders and creditors of such companies by confining the exercise of corporate powers strictly within their authorized limits, and this is given in the books as the chief reason for the rule of decision in the cases which sustain the defense of *ultra vires*.

That the public has such an interest is quite true, but whether to afford such protection the defense of *ultra vires* is always necessary in such cases is another thing. Stockholders are but one portion of the public; another portion, with equal rights of protection, is that with whom these multiform corporations deal in the daily exercise of their assumed powers. And it seems illogical to assume that the interests of the public would be best subserved by a public policy which will allow a corporation, any more than an individual, to violate the principles of common honesty and claim exemption from the obligation of its contracts by pleading its own wrong-doing. Such policy would rather seem to offer a premium for dishonest dealing.

Besides, both the State which grants these corporate powers, and the stockholders for whose benefit such powers are exercised, have their remedies, the former by interfering to revoke the charter, and the latter by an action to restrain the unauthorized undertakings. While courts are inclined to maintain with vigor the limitations of corporate actions, whenever it is a question of restraining the corporation in advance from passing beyond the boundaries of their charters, they are equally inclined, on the other hand, to enforce against them contracts, though *ultra vires*, of which they have received the benefit. If the other party proceeds to the performance of the contract, expending his money and labor in the production of values,

which the corporation appropriates, such corporation will not be excused on the plea that the contract was beyond its powers: *Bradley vs. Ballard*, 55 Ill., 413.

Corporations have the capacity to do wrong, and may overstep the limits placed by the law to their powers, and when they violate their charters in this respect their acts are illegal, but not necessarily void: *Bissell vs. Mich. etc. R. R. Co.*, 22 N. Y., 258.

The plea of *ultra vires* is not to be understood as an absolute and peremptory defense in all cases of excess of power without regard to other circumstances and considerations. The plea is not to be entertained where its allowance will do great wrong to innocent third persons: *Bissell vs. Mich. etc. R. R. Co.*, 22 N. Y., 258. Where a certain act is prohibited by statute, its performance is to be held void because such is the legislative will. So where the consideration of a contract is by law illegal, as where the cause of action arises *ex turpe*. But where the act is not wrong *per se*, where the contract is for a lawful purpose in itself, has been entered into with good faith, and fairly executed by the party who seeks to enforce it, we must assent to the doctrine of those authorities which hold that the excess of the corporate powers of the contracting party which has received the benefit of the contract is an unconscionable defense, which may not be set up to exempt from liability the party so pleading it. And such, we think, is the case before us.

The answer of the insurance company does not deny the averment in the complaint that the company "was doing business in Larimer County, in the State of Colorado, as a general fire and hail insurance company." It does not deny it entered into the contract of insurance with the appellee in manner and form as alleged in said complaint, nor that the contract was executed as averred. The sole defense upon which the appellant company relies here is its want of authority to insure against hail. By offering to insure the property of appellee against damage by hail, and by entering into the contract of insurance therefor, it claimed to possess the power so to do. It took the appellee's money and assumed the risk and obligation of paying the damage, much or little, that might occur, or of having at all to pay, if the contingency of damage should not happen within the time covered by the policy.

A loss having occurred, the company seeks exemption from the obligation it entered into by denying that it had any authority to do what it asserted the right to do when it voluntarily assumed the undertaking.

We are aware that the courts have been very slow to concede that a defendant setting up as a defense the *ultra vires* of a contract, where said contract was clearly not authorized, should be held liable on the contract, since this would appear to sustain the enforcement of an unauthorized contract, and therefore the cases show that whenever the courts could avoid this seeming inconsistency by resting the recovery upon some other ground they have done so. This has often led to equal inconsistency in other directions. The true ground would seem to be that of equitable estoppel, whereby the defendant is not permitted to rely upon or show the invalidity of the contract. In such case, the contract is assumed by the court to be valid, the party seeking to avoid it not being permitted to attack its character in this respect.

The point was strongly insisted upon by counsel for appellant in argument, that one dealing with a corporation is bound to know the extent of its powers to contract, that the corporate name itself indicate the scope of its business, and the record of its charter or articles of incorporation furnishes notice of the extent and limitation of its corporate powers and authority to contract.

While as a general proposition this is true, yet it must be conceded that this constructive notice is of a very vague and shadowy character. Every one may have access to the statutes of the States affecting companies incorporated thereunder, and to their articles of incorporation, but to impute a knowledge of the probable construction the courts would put upon these statutes and articles of incorporation to determine questions raised upon a given contract proposed, is carrying the doctrine of notice to an extent which can only be denominated preposterous. It was in answer to the same point that Chief Justice Comstock observed, in his opinion in a leading case upon this question, that "a traveler from New York to Mississippi can hardly be required to furnish himself with the charters of all the railroads on his route, or to study a treatise on the law of corporations:" *Bissell vs. M. S. & N. J. R. R. Co.*, 22 N. Y., 258. It was urged in argument on behalf of appellant that the State, which created these corporations for public good, has such an interest in their existence and perpetuity that public policy should be interposed to keep them within the legitimate exercise of their powers. This may be true to a certain extent, and the State may interpose to revoke their charters for an abuse thereof; but we take it that it is no more the public policy of the State to protect the business of private corporations than that of its individual citizens; and to

invoke public policy in a case like the one at bar, in order to prevent a corporation from doing wrong, by punishing the other party, would differ little from asking a court, on the ground of public policy, to prevent the obtaining money or goods through false pretenses by holding that the party defrauded should be punished by the loss of his money or goods.

While such wrong may be prevented by interference on the part of the State, or stockholders of the company, it cannot well be said that to cure the evil it is necessary in every case to exempt the company from the liability of its unauthorized engagements.

The principle of estoppel by conduct is the same principle which is applied by courts in holding that the statute of frauds, by which, under the general rule, a contract would be void, is never to be used for the protection of a fraud.

The essential elements of an estoppel by conduct are laid down by this court in *Griffith vs. Wright*, 6 Col., 248, to be that: 1. There must have been a representation or concealment of material facts; 2. The representations must have been made with knowledge of the facts, unless the party representing was bound to know them, or that ignorance thereof was the result of gross negligence; 3. The party to whom it was made must have been ignorant of the truth of the matter; 4. It must have been made with the intention that the other party should act upon it; but gross and culpable negligence on the part of the party sought to be estopped, the effect of which is to make a fraud on the party setting the estoppel, supplies the place of intent; 5. The other party must have been induced to act upon it. The case before us seems to be fairly brought within the foregoing rules and definitions. The insurance company, through its agent, not only concealed the want of authority to insure against hail, which it now sets up, but its open, notorious acts in soliciting policies of this character throughout the country, impliedly held out and represented its authority for such business.

Such agent was certainly bound to know the extent of the authority of the company he represented, and if his acts in the premises were not done with full knowledge of the facts his ignorance in this respect was gross and culpable negligence.

That the appellee was ignorant of the truth of the matter of want of authority in the company is not denied by the appellant company, except by an inference which, it is argued, is to be drawn that the articles of incorporation and the record thereof furnished constructive notice of the extent of authority of said company. But it seems

to us that such an inference is rebutted by the presumption fairly arising from the nature of the transaction, that the appellee would not have paid his money for the performance of a promise which he was void; that its performance could not be enforced, and that his money would be utterly thrown away.

That the offer of the appellant to insure, and the representations made to induce the appellee to enter into the contract of insurance were made with the intent that the appellee should act thereon, is self-evident from the nature of the transaction, and the acceptance by the appellee of the offer so made by the appellant; and that the appellee was induced to act up the offer and representations so made is equally apparent, for the act was an obvious sequence of the inducement.

It was strenuously contended by counsel for appellant in the oral argument of this case that whether the contract in a case of this kind is executed or not is immaterial; that the true grounds of liability depend upon, and should be placed upon, the fact of whether the elements of estoppel exist; whether the conduct of one party has been such as that the other party would be defrauded or injured thereby unless the contract should be enforced.

However this may be in respect to the other cases, or as a general rule, we are quite willing to assent to this view in the particular case before us, and to rest our decision upon the ground of estoppel by the conduct of the appellant company.

We do not say that the directors or acting officers of such company may act in excess of their legitimate powers against the interests and contrary to the will of the stockholders of such company; but while admitting the excess of proper authority, we think, on principle and the weight of modern decisions, that if the stockholders, whose business it is to see that their own managing officers act within the proper scope of their powers, either expressly, or by silence impliedly, assent to acts done on their behalf in excess of authority they should be held estopped to deny that such acts were authorized.

The appellant company here offered to pay back the money and return or cancel the note given for the policy, and counsel urgently contended that this is all that legally can or rightfully ought to be exacted. This would not place the appellee in statu quo. Every insurance company would be ready and willing to do that much after the loss had occurred, on condition of exemption from payment of the loss. The damage to appellee is the loss of his crops

against which the appellant undertook to secure him. After the loss it was too late for appellee to insure in another company having unquestioned authority to insure against such loss.

We therefore conclude that since the contract of insurance, though it may have been beyond the scope of the proper object and purposes of the company, as expressed and conferred by their articles of incorporation, was neither by statute nor by their charter expressly forbidden, nor in its nature illegal or improper, and since the conduct of the company in soliciting the insurance and entering into the contract therefor under the circumstances disclosed by this case was such that to exempt it from its engagements thereunder would result in injuring and defrauding the appellee, who in good faith dealt with the company under the belief of its rightful authority in the premises, the defense of the appellant company interposed against its liability on the contract is inequitable, unconscionable, and should not be allowed.

It is admitted that a contract is not enforceable when prohibited by statute; when not so prohibited, however, and when not illegal or immoral in its nature, nor contrary to sound public policy, a contract, even *ultra vires*, may be enforced, when, under the circumstances of its execution, every consideration of justice requires it. This is the ground of decision in most of the cases relied upon by the appellee in the case.

As is said by the Supreme Court of the United States in the case of *Zabriskie vs. Cl., Col., & Cin. R. R. Co. et al.*, 23 How. 400: "A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claim their own conduct has superinduced."

Among the many authorities examined in support of our views in this case, we cite the following: *Parish vs. Wheeler*, 22 N. Y., 503; *Bissell vs. M. S. etc. R. R. Co.*, *id.*, 258; *Bradly vs. Ballard*, 55 Ill., 413; *Whitney Arms Co. vs. Barlow*, 63 N. Y., 69; *Darst vs. Gale*, 83 Ill., 141; *State B'd of Agr. vs. Citizens' Street R'y Co.*, 47 Ind., 407; *Oil Cr. etc. R. R. Co. vs. Pa. Trans. Co.*, 83 Pa. St., 166; *Argenti vs. City of San Francisco*, 16 Cal., 255; *State of Ind. vs. Woram*, 6 Hill, 37; *Converse vs. Norwich & N. Y. Trans. Co.*, 33 Conn., 180, modifying the doctrine in the case of *Hood vs. N. Y. & N. H. R. R. Co.*, 22 Conn., 502; *Chicago Build. Soc. vs. Crowell*, 65 Ill., 453; *Ward vs. Johnson et al.*, 95 Ill., 215-240; *Zabriskie vs. Cl., Col., & Cin. R.*

R. Co. et al., 23 How., 398-401; *Hitchcock vs. Galveston*, 96 U. S., 341-351; *Nat. Bank vs. Matthews*, 98 id., 621; *Manville vs. Belden M. Co.* (McCrary, J., U. S. Cir. Ct.), 3 Col. Law, 558; *Green's Brice's Ultra Vires*, 371, and cases cited; *Sedgwick's Stat. and Const. L.*, 90; *Waterman's Specific Perf. Cont.*, cited *supra*.

The judgment of the court below is affirmed.

Judgment affirmed.

BECK, C. J., and HELM, J., concurring. Private corporations are creatures of statute, and derive their powers solely therefrom. Upon weighty considerations of public policy, and of private equity as well, the principle has been universally recognized that the characters of general laws through which these corporations derive their existence absolutely control their action; that a contract made or an act done by them which is not in any manner authorized by some express provision of the charter or law of corporations, or which may not be clearly implied therefrom, is *ultra vires*; and that such usurpation of power may be relied upon as a complete defense to a suit growing out of the unauthorized act or contract.

But, for the purpose of avoiding the infliction of manifest injustice in given cases, many courts of the highest respectability have seen fit to recognize an exception to the foregoing doctrine. This exception, when admitted, is always based upon principles largely analogous to those supporting equitable estoppels. The decisions recognizing it hold that where a corporation receives and retains the full benefit of a contract, and a failure to perform on its side would result in palpable injustice to the other contracting party, it is estopped from escaping liability thereunder through a plea of *ultra vires*.

We are inclined to the opinion that cases sometimes arise wherein this exception, properly understood and limited, should be held applicable. If a private corporation has accepted and retained the full benefits of a contract which it had no power to make, the same having been performed by the other party thereto; and if the transaction is of such a nature that the party thus performing will suffer manifest injustice and hardship unless permitted to maintain his action directly upon the contract, no other adequate relief being at his command, we think the defense of *ultra vires* may be disallowed. This, however, does not do away with the objectionable character of the unauthorized contract. It admits the legal wrong committed by the usurpation of power, but denies the equitable right of the corporation to profit through such wrong at the expense of parties con-

tracting with it; the corporation, having received and retained the benefit of the contract, is denied the privilege of invoking the illegality of its act, and thus avoiding consequences naturally flowing therefrom.

The circumstances attending and surrounding the transaction now before us, in our judgment, render this an appropriate case for the application of the foregoing equitable doctrine. For this reason we concur in the conclusion arrived at by Mr. Justice Stone, who writes the principal opinion.

COURT OF APPEALS OF TEXAS.

CONTINENTAL INS. CO.)

vs.

G. A. & I. S. BUSBY.*)

An insurance policy containing stipulations in these words: "This company may, at any time, cancel this policy by returning the unexpired premium pro rata." "The assured may, at any time, have the policy canceled by paying the customary short rates for the expired time of full term," can be canceled by the insurer, but the notice of cancellation must be given and the return premium tendered at the same time. Without both concurring the policy cannot be canceled.

If the company becomes aware of a violation of any condition of the policy and fails to cancel same, but receives a premium thereon, the policy continues in force to the expiration of the term paid for unless the policy be canceled as above. Where the policy is one continuing in force upon the payment of yearly installments, if the policy be not canceled as above, and upon any installment becoming due a tender is made and refused, the policy continues in force; but where the money is not actually offered but the insured proposes to get the money and pay the installment if the agent would state that the policy is good, there is no such tender as will bind the insurer.

HUTCHESON & CARRINGTON, *for Appellants.*

BOONE & COBB, *for Appellees.*

WHITE, P. J.

Appellant company insured appellees' house for \$600 under a policy known as the "Farm Installment Policy," for a period extending from May 1, 1882, to October 1, 1887. The assured executed therefor to the company a note for \$11, payable October 1, 1882, and also executed an obligation for \$32, as follows:—

* Opinion delivered, January 30, 1888.—From *Texas Law Review*.

Thirty-two dollars, for value received in policy No. 3,592, dated the first day of May, 1882, insured by the Continental Insurance Company of New York, we promise to pay said company, or order, by mail if requested, eight dollars and 00 cents, upon the first day of October, A. D. 1883, and eight dollars and 00 cents upon the first day of October, 1884, and eight dollars and 00 cents upon the first day of October, 1885, and eight dollars and 00 cents upon the first day of October, 1886, without interest; and it is hereby covenanted and agreed that, in case of the non-payment at maturity of any one of the installments herein named, the whole amount of installments remaining unpaid on said policy shall become immediately due and payable.

[Signed]

G. A. & I. S. BUSBY.

Busby paid the premiums due October, 1882, and October, 1883. In January, 1883, he vacated his premises and rented to a tenant. At the time the policy was issued there was no rule of the company prohibiting the assured from renting houses covered by policies to be occupied by renters or tenants. Such a rule or provision was, however, afterward adopted, and it would seem that Busby learned of the existence of such rule at or about January, 1884, when he had rented the house to a tenant, for he notified Bridges, the agent of the company, of the fact of his having rented the premises to, and its occupancy by, a tenant. Bridges told him that the company did not like for tenants to occupy dwellings insured by them; but he made no objections, nor was anything said about canceling the policy or returning the ratable proportion of the unearned premium.

Up to this time, then, there was and has been no attempt at a cancellation by the company. Had it desired to do so, on account of the rule it had adopted with regard to occupancy and possession by tenants, it would have the unquestioned right to cancel under the fourth paragraph in the general provisions of the policy, which is: "This company may at any time cancel this policy, returning the unexpired premium pro rata." "The assured may at any time have the policy canceled by paying the customary short rates for the expired time of full term."

"It need hardly be said that when the contract has once been entered into and becomes binding upon the parties, it cannot be canceled by either, unless the right be reserved:" May on Insurance, par. 67.

"Right to cancel a policy is strictly construed. This right can only be exercised within the limits of good faith. A substantial change in the circumstances increasing the risk is the usual and sufficient ground on the part of the insurers:" idem, par. 574.

In order to effect such a cancellation the rule in all such cases is that "it is incumbent upon the company desiring a cancellation of the policy before its expiration, to notify the assured that such cancellation had been made, accompanying the notice with a tender of the amount of premium for the unexpired term. Neither of these prerequisites standing alone could suffice to release the company from its obligation, but both must concur before, under the law, the appellant could avoid the liability and terminate the contract. The notice should be, in effect, that the contract is terminated, and not that it will be terminated at a future day; and the amount to be returned should be paid or tendered to the assured. * * * The act of refunding and cancellation must be simultaneous : " Wood on Ins., par. 106.

It is clear then that in January, 1884, though the company knew that a tenant had been put into the house, they did not avail themselves of the right to cancel the policy, and not having done so, remained liable under it so long as it subsisted. The premium paid by Busby October 1, 1883, continued the policy for one year, or up to October 1, 1884, unless it should be canceled by one or other of the parties under the reserved right. No steps were taken by either party to cancel and matters remained in this situation, the assured retaining his policy and the company his notes, until September 15, 1884, when Busby, the assured, received from the agent of the company a letter containing the following notice, viz :—

The third installment given for the payment of your premium for insurance in this company under policy No. 3,592 will fall due on the first of October, '84 (next month). The amount due is \$800. * * * We feel assured you will take pleasure in paying promptly the above note, thus setting an example for our imitation in the faithful payment of any loss that may occur under your policy.

Respectfully yours,

EDWARD L. BRIDGES, Agent.

It is made, however, to appear by the testimony of the agent Bridges, that this notice was not sent by himself, but through mistake by a clerk in his office. A few days after the receipt of this notice, and before the premium installment would fall due on October 1, Busby met Bridges, the agent of the company, and stated to him that "he had received the notice and was ready, and offered to pay the note then if he would receive the money." Bridges replied that the company would not permit him to receive money upon premium notes where the property was occupied by tenants, "and said he would not receive it upon that ground." Busby testified that he

told Bridges that he would go and get the money if he (Bridges) would say that the policy was good. He never made any offer to pay because the agent told him he would not receive it, and it would be useless to do so.

On October 1, 1884, when the second installment fell due, Busby did not pay the same, nor did Bridges return his notes or obligation and demand a return of the policy for cancellation. Nothing further was said or done by either of the parties about the matter, until December 4, 1884, when the house which was insured was burnt by fire. After its destruction Busby notified the company and demanded the money for which it had been insured. This they refused to pay, whereupon he instituted this suit and recovered the judgment against the company here appealed from.

A risk taken by a policy of insurance may be terminated in several ways. "It may be terminated either by expiration of the term for which the insurance was effected; by a voluntary abandonment of the contract; by mutual consent; by a cancellation by the insurer or a surrender of the insured; in either case by some power reserved in the contract; by breach of some condition by the insured, of which the insurer takes advantage, or by the happening of the contingency insured against:" 4 Waite's Acts. and Defs., p. 71. And while, as we have seen, cancellation is one mode, and that the right to cancellation depends upon notice and payment of the return premium, and that the policy does not terminate in such cases until the return premium is paid or tendered: 4 Waite's Acts. and Def., p. 72. Still, that is not the only mode of terminating the risk. As stated above, a policy may be forfeited by a breach of some condition contained in it. And, "in case of a claim that the insurance has been forfeited by a breach of some condition, it will depend on its terms whether the policy becomes void at once or the company must avoid it by some act on their part:" *idem*, 72.

One of the conditions in the policy was: "This company shall not be liable for any loss or damage under this policy if default has been made in the payment of any installment of premium due by the terms of the installment note." Now, when the loss and destruction of the property occurred on December 4, 1844, the premium due on the installment note for October 1, had never been paid by Busby, the insured. There can be no question but that "the payment of the premium is a condition precedent to the right to recover for a loss" (*Bergsen vs. Builder's Ins. Co.*, 38 Cal., 541), unless this condition precedent was waived by the company, which

they could do (*Baptist Church vs. Brooklyn Ins. Co.*, 19 N. Y., 5 Smith, 305), or by their act had rendered its specific performance unnecessary, then the breach of failure to perform by the assured would be a termination of the risk and the company would be no longer liable under the contract, and could treat it as rescinded from that time. In such a case the company would not be bound to cancel the policy, for the policy being in hands of the assured, was beyond the control of the company. Nor was the company bound to pay the unearned premium, because no premium has been paid or due the assured. It is true the company might have surrendered up the notes, but we are not advised that that act would be a necessary prerequisite to a rescission which had already been accomplished by the act of the other party.

But it is contended that a tender of the premium to the agent of the company was made by Busby, and that this tender and its refusal by the agent obviated the obligation to pay the premium on October 1, 1884. It has been held that a tender is equivalent to payment, if the premium could have been paid in the funds tendered : *N. Y. Ins. Co. vs. Clopten*, 7 Bush., Ky., 179.

With regard to this matter of tender, as we have heretofore seen, Busby after receiving the notice mentioned, and before the first of October, 1884, told the company's agent that if he would make the policy good he would pay it, and the agent refused to take the money. Bridges, the agent, testified that he saw Busby either the first, or just before, or just after October 1, and that Busby then told him he would pay the premium, and he refused it. He says "it would have been useless for him to have counted out the money to me, for I would not have received it, because of my instructions from the company not to receive it on the ground that the house was occupied by a tenant." It will be noticed that he does not fix the time of the tender in this statement. On his examination in chief he had stated that soon after September 15, perhaps a day or two before the note was due, or maybe not so long, the plaintiff, Busby, met the witness on the street and said : "I will pay you that premium if you will say that the policy is good, and he (witness) then told him (Busby) that the company refused to take the money, and he would have refused to take the money if it had been offered, but it was not, and the matter then ended." This statement is corroborated by the testimony of Busby, who fixed the time of the tender before the note fell due. Now, if this tender was a good, valid, and sufficient one, it was equivalent to a payment, and in that event the

company under the contract could, by virtue of the reserved right, have cancelled the contract even then, but in the exercise of the right to make their action binding, the assured should have been informed in no unmistakable terms, that the company would insist upon a forfeiture, and at the same time a notice should have been given that the policy was canceled then and there : *Crescent Ins. Co. vs. Griffin*, 5 *Texas Law Review*, 695; *Life Ins. Co. vs. LePert*, 52 *Texas*, 504.

This was not done, and consequently there was no valid forfeiture or cancellation of the policy by the company. This renders it necessary to determine, and the whole subject-matter turns upon the validity and sufficiency of the tender as obviating the necessity of a payment by the assured, was the tender valid and sufficient by law? Concede that the tender was made before the note was due; the money was not actually produced; the tender was not an absolute one because it was coupled with the condition that the agent should say that the policy was good.

Mr. Greenleaf says, To support the issue of tender of money it is necessary for the defendant to show that the precise sum was actually produced : 2 *Greenl. Ev.*, 13 ed., sec. 601. It must also appear that the money or other thing tendered was actually produced to the creditor : *idem*, sec. 602. It must also appear that the tender was absolute, for if it be coupled with a condition * * * the tender is not good : *idem*, 605. As to the time of tender, it must in all cases by the common law be made at the time the money became due : *idem*, 607. The production of the money is dispensed with if the party is ready and willing to pay the sum, and is about produce it, but is prevented by the creditor's declaring that he will not receive it. * * * The money or other thing must be actually at hand and ready to be produced immediately if it shall be accepted; as for example, if it be in the next room or upstairs; or if it be a mile off, or can be borrowed and produced in five minutes, it is not sufficient : *idem*, 606. In this case *Busby* did not have or produce the money. *Busby* says he told *Bridges* that he would go and get the money if he (*Bridges*) would say that the policy was good.

As to the time of making the tender, "it is the rule of the common law that a tender must be made on the very day on which the money is due if that day is fixed and made certain by the contract (*Dixon vs. Clark*, 5 C. B., 365; *Powe vs. Powe*, 42 *Ala.*, 113; *Toulumine vs. Sager*, *idem*, 127), and a tender of money before it is due is

of no avail, as the creditor is not bound to receive it before it is due according to the terms of the contract: *Lillon vs. Britton*, 4 Halst., N. J., 120; *Saunders vs. Frost*, 5 Pick., 267; *Mitchel vs. Cook*, 29 Barb., 243. When the money is not to become due on a fixed day, nor until demand is made, no tender need be made before such demand, since the money will not be due before that time. But when the money is to be due or payable on or before a specified day a tender may be made at any time before the day fixed, because the debtor has the option on that day or before that time, if he so elects: 7 Waite's Acts. & Defs., pp. 580, 581.

In this case the time of payment was absolutely fixed, not on or before, "but upon the first day of October, 1884." Had then Busby's tender been otherwise sufficient, it was not sufficient unless afterward made upon October 1. He was put upon his notice that the company would not receive the payment, and to have put them in default, so as to make his tender available he should have made it again on the day when by his contract he had obligated himself that the money should be paid. A failure on his part to make the tender on that day does not entitle him to plead a waiver of payment by the agent at a former day or time, even had his former tender been sufficient, which under the rules of law it was not. What then is the statute of the case? By his contract he was to pay October 1. He has not done so. He has not absolved himself from this obligation by tendering the money when due, nor has the company estopped itself in waiving the payment by refusing to receive it when lawfully tendered. By express terms of the contract or policy he agreed that the company should not be liable, if default was made in the payment of any of his installment premiums. He has made default; he has committed a breach of one of the most important conditions of the contract. This of itself was a termination of the risk under the contract so far as the company was concerned. It is not a question of cancellation, but of forfeiture and abandonment on breach of the contract by one of the parties thereto. As before stated, conceding that the tender was made before the note was due, then this action is, in effect, a suit for specific performance of a contract by a party who has himself breached the contract.

A well-established and familiar rule of equity is that a party who is himself in default is not entitled to claim specific performance. Mr. Story says: "In cases of covenants and other contracts, when specific performance is sought, it is often material to consider how

far the reciprocal obligations of the party seeking the relief have been fairly and fully performed, for if the latter have been disregarded, or they are incapable of being substantially performed on the part of the party so seeking relief, or from their nature they have ceased to have any just application by subsequent events, or it is against public policy to enforce, then courts of equity will not interfere": 1 Story's Equity Jur., 12 ed., sec. 736.

If, on the other hand, however, a tender in fact made on October 1, which is a question left in doubt by the testimony of Bridges, the agent, then under the rules of law announced the appellee, the policy not being ipso facto, Busby would be entitled to a specific performance recovery. If this question had not been left in doubt we should have reversed the judgment and rendered one in favor of appellant. As it is, we shall reverse the case and remand it for another trial. Reversed and remanded.

SUPREME COURT OF PENNSYLVANIA.

Error to the Court of Common Pleas, No. 4, of Philadelphia County.

DAY

vs.

NEW ENGLAND MUTUAL LIFE INS. CO.)

The law relating to attachments contemplates actual proceedings resulting in judgment for one party or the other, and not for an entire suspension of proceedings for an indefinite period.

A policy of insurance upon the life of A was taken out, payable to A, his executors or administrators, for the benefit of his widow if any; later, and when A was a widower, an attachment execution was issued by B, a creditor of A, against the insurance company as garnishee of A; before an appearance entered or plea pleaded, A died, leaving no widow. *Held*, that the sum due from the insurance company on the policy was not, upon the death of A, bound by the attachment of B, but passed at once to his—A's—legal representatives as assets.

Boude insured his life in the New England Mutual Life Insurance Company, payment to be made to "Boude, his executors or administrators in sixty days after the due proof of the death of * * * Boude, after deducting therefrom all indebtedness of the party to the company, together with the residue, if any, of the year's premium, for the benefit of his widow, if any." Day, who was a creditor of Boude, obtained a judgment against him; later, Day issued an attachment execution against the New England Mutual Insurance Company, as garnishee of Boude, who was living at the time, and a widower; before appearance entered or plea pleaded, Boude, being yet a widower, died. The jury rendered a special verdict, in effect that the attachment had been served; that Boude had held

* Decision rendered, February 15, 1886.—From *Eastern Reporter*.

the policy of insurance; that he was a widower at the time of the issuing of the attachment, and so continued till the time of his death; that at the time of his death the policy was outstanding and in full force, and that no change had been made in the beneficiary; that a sum was due upon the policy, and that if the court be of the opinion, etc. The judgment was entered for defendant.

F. F. BRIGHTLY, *for Plaintiff in Error.*

The fifty-fifth section of the act of 13th June, 1836, enacts that foreign attachments may be levied of debts due and owing at service of the writ, or "at any other time." The thirty-fifth section of the act of 16th June, 1836, enacts that debts may be levied and attached "in the manner allowed in case of foreign attachment." Under these acts it is well settled that an attachment execution binds everything that comes into the hands of the garnishee until plea pleaded: *Benners vs. Buckingham*, 5 Phil., 68; *Mullen vs. Maguire*, 1 W. N. C., 577. The policy of insurance in this case is payable to "James H. Boude, his executors or administrators, for the benefit of his widow, if any." He left no widow, and it became payable as if such beneficiary clause did not exist, viz.: to "James H. Boude, his executors or administrators." The contention of the defendants in the court below was, that the fund was not bound by our attachment, because it never was payable to James H. Boude, as, by its very nature, it was not payable at all until James H. Boude himself ceased to exist, and this seems to be the view that the court below took of the matter. In reply, it is submitted that the policy is in words payable to James H. Boude, and that, as was said in *Deginther's Appeal*, 83 Penn. St., 337, the argument is "too refined" that a man could not be considered the owner of that which could not come to his estate until after he ceased to exist. In other words, at a man's death his estate includes not only that which he dies possessed of, but also he is considered as having owned that, which comes to his estate on the contingency of his death. On what other theory could it pass to his heirs and distributees? Can it for a moment be contended that such a fund would not pass under his will? It is admitted by the other side that this fund is liable for his debts. If so, it must be on the principle that it is considered as having been his at the time of his death. When James H. Boude died, therefore, on June 8, 1884, this insurance money became to all intents due him, and being so, it was a debt "due and owing" before plea pleaded, and was bound by this attachment. It is further con-

tended that the policy of insurance was itself attachable. A policy of insurance is a chose in action for the payment of money at a future day. "It is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life:" Baron Parke, cited by Reed, J., in *Elliott's Appeal*, 50 Penn. St., 75. A check payable at a future day is attachable: *Fulweiler vs. Hughes*, 17 Penn. St., 440; *Walker vs. Gibbs*, 2 Dall., 211; *Franklin Fire Ins. Co. vs. West*, 8 W. & S., 350; *Coates vs. White*, 39 Leg. Int., 60, Thayer, P. J. And a promissory note not yet due: *Kieffer vs. Ehler*, 18 Penn. St., 388; *Kent vs. Nav. Co.*, 1 Tr. & H., 1,183; *Day vs. Zimmerman*, 68 Penn. St., 72.

So is rent falling due after service of writ: *Derham vs. Berry*, 5 Phil., 475. It is a chose in action belonging to the assured: *Keller vs. Gaylor*, 3 Ins. L. J., 303; *Bliss Ins.*, 526. Policies are securities for money, valuable choses in action, which can be sold at public or private sale, and are included in the general words "personal estate or property:" *Elliott's Appeal*, 50 Penn. St., 80; *Stokae vs. Cowan*, 7 Jur. (N. S.), 901. The proceeds of a policy on testator's life pass under a bequest of "any money he might die possessed of, or which might be due and owing to him at the time of his decease:" *Petty vs. Wilson*, 4 L. R., Ch. App., 574; *McCord vs. Noyes*, 3 Bradf., 139; *Bliss Ins.*, 540. A policy passes under a bequest of "debts and debentures:" *Phillips vs. Eastwood*, Lloyd & G. Cas. temp. Sugd., 270. A life policy, while the insured is still alive, may be reached and made to apply on a debt due from the owner: *Bliss Life Ins.*, 592, citing *Anthracite Ins. Co. vs. Sears*, MSS., Sup. Ct., of Mass. The attachment is an equitable assignment of the thing attached, a substitution of the plaintiff for the defendant to the latter's right against the garnishee: *Reed vs. Penrose*, 36 Penn. St., 229. It puts the attaching creditor in the same relation to the garnishee as was occupied by the defendant before the attachment was laid: *Fessler vs. Ellis*, 40 Penn. St., 248; *Manigle's Estate*, 32 Leg. Int., 83; *Selfridge's Appeal*, 9 W. & S., 55. He stands "in the shoes of the defendant:" *Patten vs. Wilson*, 34 Penn. St., 299; *Strong vs. Bass*, 35 id., 333.

SAMUEL C. PERKINS and LEWIS STOVER, for Defendants in Error.

The first position taken by the plaintiff in his argument is stated far too broadly, viz., that an "attachment execution binds everything which comes into the hands of the garnishee until plea pleaded." Neither is he sustained by the two cases cited—*Benners vs. Buck-*

ingham and Mullen vs. Maguire. The two cases decide only that things, otherwise subject to attachment, are bound in the hands of the garnishee though they came into his hands after service of the attachment. To this we assent; but we do not agree that everything is subject to an attachment; neither do we dispute the principles decided in Degenther's Appeal; we admit that everything in esse or in posse belonging to a decedent are assets in the hands of his administrator; but it does not follow that every asset is subject to attachment. The point in Elliott's Appeal was whether an assignee for creditors, or an executor in trust for creditors, could attack the voluntary assignment of a policy in fraud of creditors. And this court held that they could, but at the same time the court pointed out the distinction between such persons and judgment creditors, holding that the latter could not, because the policies are not subject to execution under the statute of Elizabeth. Neither does it follow that a thing may be attached because it may be assigned. We are told that Esau sold his birthright, but no one would think of attaching such a thing. A test as to what may be attached was given by this court in the case of Bunn's Appeal, 14 W. N. C., 193. The plaintiff contends further that there was an attachable interest in the policy during the lifetime of the defendant. There certainly was no debt then due him nor cause of action vested in him nor his legal representatives in his exclusive right, and although his assignee in bankruptcy or in insolvency might have compelled an assignment from the defendant, it would not have given them any right of action against the assurers. The distinction between a policy of insurance and a promissory note, draft, or check, is this: Here no debt arises until the conditions are performed; there a debt exists but payable in future. The garnishee here may safely answer that he owes defendant no debt or demand; there he must admit a present debt though payable in future, which, of course, will be bound by the attachment. But here the execution finds no goods, and of course must be returned "nulla bona." In the case of Peebles vs. Meeds, 96 Penn. St., 150, where an attachment was laid on a due-bill for \$2,000, payable in board, Gordon, J., says, page 154: "Whether or not a claim such as this is attachable is the question for our solution. We think it is not. It is not a debt due at the present, or which will become due in future, so that no judgment can be had against the garnishees in this form." It may be argued that this debt is payable in future; that is true if the conditions be performed, but it is not payable to the defendant in his lifetime, nor

to his legal representatives after him, except as trustees for all his creditors. The defendant could not transmit this debt to his heir at law unincumbered with his debts, and surely the rights of the attaching creditor can rise no higher than the defendant's. "The writ of attachment cannot create a liability:" Bunn's Appeal, at page 201. Neither can the equities of other creditors be worked out under this writ. "An attachment in execution is strictly a statutory remedy for the sole benefit of the attaching creditor. * * * It has no machinery by which other creditors can be introduced." Same case, page 203.

GREEN, J.

The wife of the assured having died during his life, the fund attached may be regarded as if it were due upon an ordinary policy payable upon the death of the assured. This policy was not in any circumstances payable to the assured himself nor to any one during his life. It was only payable after his death, and as it was never assigned it was payable only to his executors or administrators. No title to have the fund ever existed except in the legal representatives of the deceased. No action could by any possibility have been maintained for the recovery of the money by the deceased in his lifetime, nor by any other persons except upon the condition that he had first died. His death was simply and absolutely indispensable to the existence of any right of action on the policy. More than this, if the assured had voluntarily surrendered the policy at any moment before his death, or if it had become forfeited by breach of condition, no right of action would ever have existed even in his legal representatives. Still more, at no time during his life could the proceedings upon the attachment have been brought to final judgment in favor of the attaching creditor, because it could never be known until the death of the assured had actually transpired whether any money would become due upon the policy. The law regarding attachments contemplates, and provides for, actual proceedings resulting in judgment for one party or the other, not for entire suspension of proceedings for an indefinite and uncertain period. A policy effected at the age of twenty-one payable at death might not become payable in fact for sixty or more years. Can it be that an attaching creditor upon such a policy could demand the judgment of a court against the company as garnishee, payable at the death of the assured, or as an alternative claim that the court should suspend all proceedings until the assured shall die? It is incredible. No judgment could be given in advance of death be-

cause no court could possibly know for what amount the judgment should be rendered, nor whether any amount would ever become due. On the other hand an order to suspend proceedings during the life of the assured is so entirely at war with the whole theory of legal process to enforce remedies, so unheard of in the practice, that it has neither precedent to sustain it, nor any sound principle to sanction it.

But apart from those objections, which seem to be insuperable at the very first moment when the money does become due on such a policy as this, it is due, and belongs to, the legal representatives of the assured and is, of course, assets in their hands for the payment of all his debts. There is not a single instant of intervening time after his death, and before the rights of his representatives accrue, during which a previously issued attachment can fasten upon the fund upon the theory that it is his. While it is his in the sense that his representatives may have it derivatively from him, their title to it is peculiar to themselves and immediately and necessarily inures to the benefit of all who are interested in the decedent's estate, whether as creditors or distributees.

It is argued that a life policy is assignable by the assured and therefore ought to be regarded as attachable as his. The argument is not sound, regarded even as a general proposition, because things are not necessarily attachable because they are assignable. Almost every form of property or right, whether in esse or posse, is assignable. But many things are not attachable though they are in present existence. Thus wages of labor and money in the hands of an officer of the law are not attachable, the one by force of a statute and the other under the decisions of the courts. So a balance of money due to a defendant under the exemption law and in the hands of his attorney is not attachable: *Gery vs. Ehrgood*, 7 Gas., 329. Nor an executor's commissions—11 Wr., 94, *Adams' Appeal*; nor the fees due a public officer: *Hutchinson vs. Gormley*, 12 Wr., 270. Nor money granted by the States for losses during the war. 5 P. F. S., 430. Other cases might be mentioned but it is unnecessary. *Deginther's Appeal*, 2 Norr., 337, was cited, but it has no application. It decided nothing more than that the husband as a distributee of his wife's estate was entitled to his share of the proceeds of a policy effected by her on his life, and she having died first, his representatives were entitled to receive his share upon his death. The decision was in entire conformity with the principles above stated. Judgment affirmed.

SUPREME JUDICIAL COURT OF MAINE.

STOWE
vs.
PHINNEY.*

A life policy was payable to the insured, his executors, administrators, and assigns for the sole benefit of the children of the insured. The plaintiff alleged that he was a creditor of one of the children, and summoned the company as trustee.

Held, That in the absence of an assignment only the administrator or executor could maintain an action at law against the company, and the latter was not chargeable as trustee.

S. C. STROUT, H. W. GAGE, and F. S. STROUT, *for Plaintiff*.
DRUMMOND & DRUMMOND, *for Trustee*.

FOSTER, J.

The Union Mutual Life Insurance Company issued a policy of insurance to Edmund Phinney for the sum of \$4,000. By the terms of that policy the company expressly promised "to pay to Edmund Phinney * * * his executors, administrators or assigns, for the sole use and benefit of" his four children therein named, and the survivor or survivors of them, the amount above named, after deducting therefrom any indebtedness the company might have on account of this contract, within ninety days after notice and proofs of death.

On the 31st day of October, 1884, Edmund Phinney died, leaving the four children surviving him, of whom the defendant is one. Thereafter, within the time named for the payment of said insurance, this action was commenced. The plaintiff alleges that the

* Decision rendered, May 17, 1886.

defendant is owing him and has summoned the insurance company as trustee. The only question presented is, whether this company can be legally held in this suit. An administratrix has been appointed upon the estate of the deceased. The defendant, since the commencement of this action, has assigned all his interest in the policy, and his claim upon the administratrix of the estate to the fund, to a third party, who claims that the fund cannot be legally attached in this process, and that it is payable from the company to the administratrix and not to this defendant.

If the administratrix is the only party who could maintain this action at law upon this contract, it necessarily follows that a payment by the company to any other party would not be justifiable, and consequently, this suit could not be maintained as against the alleged trustee. It should be understood that we are not speaking of the rights of these parties otherwise than in an action at law. Whatever might be our decision, were this in its nature an equitable trustee process, as now provided by R. S., chap. 77, § 6, par. 10, where the remedy is more elastic and equitable than in suits at law, it is unnecessary now to determine.

Upon a careful consideration of the case, and from an examination of the authorities, we feel confident that the company is not chargeable in this process. It is the established general rule that a party is not chargeable in trustee process with respect to credits, unless he is liable in an action to the principal defendant. This test, it is true, is not always decisive, for there are exceptions to the rule. The facts in this case, however, do not bring it within any of those exceptions. The question then is, who is the party that can maintain an action upon this contract?

Our attention has been called to the various decisions, not only in this but in other States, bearing upon the question, whether, when a promise is made to one party for the benefit of a third, the latter can maintain an action upon such promise. We do not, however, consider it necessary, in arriving at a proper decision in this case, to enter upon that question, nor to extend the doctrine as laid down in *Mellen vs. Whipple*, 1 Gray, 317, to a case like this, where the express terms of the contract and the intention of the parties as evidenced by those terms must be the rule by which we are to be governed in our decision.

The contract in this case was made by the company with Edmund Phinney, the deceased. By that contract the amount was made payable to him, his executors, administrators, or assigns, for the sole use

and benefit of his four children. At his decease the administratrix of his estate was the only party who could legally enforce that contract. The insurance, although for the sole use and benefit of the children, was payable, not to them, but by the terms of that contract, to his own legal representative. The company as well as the deceased was party to that contract. It is unlike those cases where, by the terms of the contract, it was expressly promised that the amount was to be paid, either absolutely or upon the happening of some expressed contingency, to the beneficiaries themselves instead of the legal representative of the assured.

Thus in *Martin vs. Aetna Ins. Co.*, 73 Me., 25, the policy was in the name of the wife on the life of her husband, and the amount was made payable to her, her executors, administrators, or assigns, if she survived her husband, otherwise to their children. The wife did not survive her husband, and the court held that by her death, the promise of payment to her, being contingent upon her surviving her husband, ceased, and was by the express provisions of the policy transferred to the children, who became the sole beneficiaries, and the only parties who could avail themselves of the promise.

Another illustration from our own court in the case of *Cragin vs. Cragin*, 66 Me., 517, where the deceased procured a policy of insurance upon his life "for the benefit of his wife and children" and the same was made payable to them—the beneficiaries—their executors, administrators or assigns; and it was held that the insurance could not have been collected in the name of the administrator of the deceased, but that it was the property of the widow and children by virtue of the express terms of the contract. So in *Knickerbocker Ins. Co. vs. Weitz*, 99 Mass., 159, the contract was between the company and the wife of the assured, and the amount was made payable to her, her executors, administrators or assigns, and in case of her death before that of the assured, it was payable to her children "for their sole use or to their guardian, if under age." On a bill of interpleader by the company the court say: "She having died before the termination of the policy, and her husband having also died within the term, the policy, by its express provisions, was not payable to her representatives or assigns, but to the child or his guardian;" and that the latter was entitled to recover the amount.

On the other hand we find that when the contract is that it is to be paid to the representatives of the assured rather than to the beneficiaries, such representatives are the only proper parties to maintain an action for its recovery. When collected the fund is

held by them as trustees under an express trust for such beneficiaries as may be entitled to it. This doctrine is in harmony with the entire line of decisions upon this question, and is founded upon reason as well as authority.

The question arose in *Burroughs vs. State Assurance Co.*, 97 Mass., 359, where the policy was made payable to the assured, his executors, administrators, and assigns, for the use of his wife and children; during his lifetime the assured with the assent of the company assigned the policy, and it was held that the assignee might maintain an action at law to recover the amount due, although the policy was expressed to be for the use of the wife and children, the plaintiff's right to recover at law resting upon the express contract between him and the insurers arising out of the terms of the policies and of the assignments to which they have assented.

The next case was that of *Campbell vs. New England Ins. Co.*, 98 Mass., 400, in which the policy was made payable to the assured, his executors, administrators, and assigns, for the benefit of a wife of the brother of the assured, who brought an action to recover the insurance in her name as beneficiary. Objection to the maintenance of the action not having been seasonably taken, judgment was recovered in her name. Gray, J., says: "In the present case, the plaintiff, though not the assured, was the person for whose benefit the policy was made, and was therefore the owner of the entire equitable interest, and might have maintained an action upon it in the name and without the consent of the administrator, or, if the latter had collected the amount of the policy, might have sued him for the proceeds. The plaintiff had the equitable interest in the policy, although not the title to support an action at law in her own name against the insurers."

In *Gould vs. Emerson*, 99 Mass., 154, the policy was made payable to the assured, his executors, administrators, or assigns, for the benefit of his widow, if any, and his surviving child or children. The court there say: "The contract of the insurance company having been made with the assured, his executors, administrators, and assigns, the defendant, as his administrator, might by law collect the amount of the policy."

As if the question had not been sufficiently settled, it was squarely met in *Bailey vs. New England Ins. Co.*, 114 Mass., 177. In this case the assured procured a policy upon his life payable to him, his executors, administrators, and assigns, for the benefit of his widow.

Suit was brought in the name of the beneficiary against the company, and judgment was rendered in favor of the defendants. The court, in referring to the previous decisions of *Burroughs vs. State Assurance Co.*, and *Gould vs. Emerson*, made use of the following language: "The principle upon which these decisions rest is, that in policies of this kind the executor, administrator, or assign becomes a trustee under an express trust, and the legal title being in him he can maintain an action in his own name against the company. It therefore necessarily follows that the cestuis que trust cannot maintain such action, but must have their rights determined between themselves and the trustee in other forms of proceeding. This brings this class of trusts within the general rules governing all trusts, and renders the practice simple and uniform. To allow cestuis que trust to maintain actions in their own names might subject insurers to several suits on the same policy, or call upon them to determine who has the beneficial interest, or force them to resort to a bill of interpleader to ascertain the equitable rights of the parties." This case is cited in support of the decision in *Unity Association vs. Dugan* (118 Mass., 221), where the policy in that case was taken out by the assured for sole use of his wife, and the court held that "not being a party to the contract, nor named therein as payee, she could not maintain an action at law thereon," and that the sole right to sue at law upon the policy after the death of the assured would be in the administratrix of his estate, and that the association might safely have paid the amount of the policy to her.

Stokell vs. Kimball (59 N. H., 14), is in accord with the principles laid down in the foregoing decisions, holding that where the policy is by its terms payable to the assured, his executors, administrators and assigns, the executor or administrator is a trustee or depositary to recover the money for the purpose of paying it to the beneficiaries. Our own court, in *Cables vs. Prescott* (67 Me., 583), recognize the same doctrine, where it is held that the contract vests in the party to whom it is made payable for the benefit of the cestui que trust.

Nor does the case of *Norris vs. Massachusetts Ins. Co.* (131 Mass., 294), to which our attention has been called by the learned counsel for the plaintiff, militate against the conclusions arrived at in this case, or the other decisions to which we have referred. It will be found that the case was a bill in equity, in the nature of an equitable trustee process, and not an action at law. The remedy there is much broader, and oftentimes more efficacious, for while in such a pro-

ceeding, as in the case last named, even the entire equitable interest of the beneficiary may be reached and applied to the payment of his debt—*Donnell vs. Railroad Co.*, 73 Me., 570; *Phoenix Ins. Co. vs. Abbott*, 127 Mass., 560—yet a merely equitable right is not attachable by trustee process in an action at law: *Massachusetts Nat. Bk. vs. Bullock*, 120 Mass., 88; *Drake Attach.*, § 457.

We are of opinion that the questions involved in this case have been so far settled by judicial decisions as to render any further expression of our views unnecessary. Recognizing as a fundamental doctrine of trustee process that the plaintiff does not, as a general rule, acquire any greater rights against the trustee than the defendant himself possesses, the exceptions to which rule do not apply to the case before us, our decision is that the entry should be trustee discharged with costs.

Peters, Ch. J., Walton, Virgin, Libbey and Haskell, J. J., concurred.

COURT OF APPEALS OF KENTUCKY.

Appeal from Henry Circuit Court.

BLACKERBY

vs.

CONTINENTAL INS. CO.*

A policy exempting the company from liability while the insured is in default upon any premium, is valid unless he can show that the default was caused by conduct of the insurer, as where the insurer failed to provide an agent in the State to whom the premium could be paid.

Parol evidence is admissible where the entire contract is not reduced to writing. Parol evidence of statements made by the agent of the company as to the place of payment (the policy being silent on the subject) are admissible.

CARROLL & BARBOUR, E. J. TYLER, *for Appellant.*S. D. PARRISH, JOHN. D. CARROLL, *for Appellee.*

HOLT, J.

The policy of insurance issued by the appellee, the Continental Insurance Company of the city of New York, to the appellant, Samuel J. Blackerby, contains this provision:—

“This company shall not be liable for any loss or damage under this policy, if default shall have been made in the payment of any installment of premium due by the terms of the installment note. On payment by the assured or assigns of all installments or premiums due under this policy, and the installment note given thereon, the liability of this company on this policy shall again attach, provided written consent of the superintendent of the western depart-

* Opinion filed, February 2, 1886.—From *Kentucky Law Reporter*,

ment be first obtained, and this policy be in force from and after such payment, unless this policy shall be void or inoperative for some other cause. But this company shall not be liable for any loss happening during the continuance of such default of payment, nor shall any such suspension of liability under this policy on account of such default, have the effect of extending such liability beyond the period of its termination as originally expressed in writing hereon. It is further provided that no attempt by law or otherwise to collect any note given for the cash premium, or any installment or premium due upon any installment note, shall be deemed a waiver of any of the conditions of this policy, or shall be deemed in any manner to revive this policy; but upon payment by the assured or his assigns of the full amount due upon such note and cost, if any there be, this policy shall thereafter be in full force, unless the same be inoperative or void from some other cause than the non-payment of such note."

The premium or "installment note," which the appellant executed to the company, reads thus:—

"For value received in policy No. B, 219,992, dated 13th of March, 1879, issued by the Continental Insurance Company of New York, I promise to pay said company or order (by mail if requested) fourteen dollars and 40 cents upon the 1st day of March, 1880, and fourteen dollars and 40 cents upon the 1st day of March, 1881, and fourteen dollars and 40 cents on the 1st day of March, 1882, and fourteen dollars and 40 cents on the 1st day of March, 1883, without interest; and it is hereby agreed that in case of the non-payment of any one of the installments herein named at maturity, the policy for which this note was given shall cease and be void until revived by written permission of the superintendent of the western department, Continental Insurance Company, and the whole amount of installments remaining unpaid on said policy shall be considered as earned."

The company for defense to the appellant's claim for a loss, which occurred on June 8, 1880, rely upon the fact that the installment of premium, which was due on March 1, 1880, had not been paid when the fire occurred, and that by the failure to pay it the policy became ipso facto void.

Upon the other side it is urged that the company cannot now claim that the policy ceased with the non-payment of the premium installment, because it yet holds the obligation for the entire premium; and that unless it surrenders it, it cannot ask that the policy

be considered as forfeited, because otherwise there would be no mutuality of obligation.

It is well settled, however, that a condition like this one in a policy of insurance is valid, and that in case of a breach of it by the insured without a valid excuse, the obligation of the insurer is at an end, although the premium note of the insured remains binding upon him. The parties have the right to make their own contract, and to fix its terms and conditions; and unless they are illegal or in violation of public policy, they will be upheld. In this instance they could have agreed upon a higher rate of premium, and they had an equal right to agree that the period of time to be covered by the insurance should become shorter upon some contingency without altering the amount of the premium—especially would this be reasonable and just as to any contingency which the legal duty of the insured requires him to, and which he can prevent.

Any other rule would require the insurer to carry the risk, although the insured was at the same time violating the contract without excuse; and to require the company to waive its right to the premium before it could insist upon a release from the risk, brought about by the failure of the insured to perform his part of a contract executory upon both sides, would establish a rule in favor of the latter resting upon his own default and a violation of his legal duty. If he pays the entire premium in advance or fails to pay it *ad diem* or at maturity as he has contracted, the law will not relieve him when the forfeiture of the policy arises from his own neglect.

It is vital to the existence of fire insurance companies and the interest of both the stockholders and policy-holders, that the patrons should be prompt in the payment of their premiums; and upon the other hand the insurer should be held to a just performance of the contract; but if the insured without sufficient excuse has failed to comply with the conditions which constituted the consideration for the undertaking of the company, his complaint in case of a subsequent loss cannot be heard.

If he neglects to pay his note without a valid excuse it is a violation of his plain duty, and if a subsequent loss occurs he has no right upon any legal or equitable principle to re-imbursement: *Wall, etc., vs. Home Ins. Co.*, 36 N. Y., 157; *Williams etc. vs. Albany City Ins. Co.*, 19 Mich., 451; *Muhleman vs. Nat. Ins. Co.*, 6 W. Va., 508; *Watrous vs. Ins. Company*, 35 Iowa, 582. While, however, the time of payment of a premium is of the essence of a contract of insurance; and while the conditions of a policy which the courts regard as

valid, cannot be held to be meaningless or be avoided, save for a sufficient cause, yet forfeitures are not regarded with favor. The belief long prevailed that the insurance business could not be carried on without the power to impose the most stringent conditions for delinquency, owing to the fact that prompt payments constitute its very life, and while this is so, yet more liberal views have properly obtained of late, and the contract will be liberally construed as to the insured. We do not mean by this that the law will not uphold a condition in a policy which is not illegal and contrary to public policy, but that a court will seize hold of a reasonable excuse to avoid a forfeiture.

If for instance the insured can show some reasonable excuse for non-payment of the premium, based upon the conduct of the insurer, the policy will not be regarded as forfeited. In this instance neither the policy or the obligation of the insured fixed a place for the payment of the premium, or named the person to whom it must be paid. The appellant is a citizen of this State; the appellee is a foreign company with its principal office, as the policy shows, in New York City; a branch office for the western department in Chicago, Ill., and a local agent in this State. It is urged that under these circumstances, the appellant, to avoid a forfeiture of his policy, was bound to know that his note was at the Chicago office, and to make payment there. We see no reason, however, why from the contract (and the indorsement upon the back of it is no part of it), the insured would not have had a better right to suppose that it must be paid at the New York office.

What, however, was the expectation and intention of the parties to the contract? In view of their situation and the attending circumstances, it is unreasonable to suppose that it was contemplated that the appellant should be compelled, when the appellee had an agent or agents in this State, to go out of it and make his payments in a distant State and hundreds of miles away. Let us see how this would work. A few companies, located in the large cities of this country, control the insurance business. They solicit it in every State of the Union, and conduct it by local agents, who obtain the insurance, make the contracts for it, and receive the premiums. This is now the universal custom. Suppose, contrary to this general practice, that the premiums had to be paid at the home or some distant office, and that no local agents, to whom the premiums could be paid, were accessible. Would not this greatly decrease the number of risks, as well as inconvenience the public? These considera-

tions have induced a course of business upon the part of the insurance companies, which authorizes a general belief that the premiums can be paid at home, and that the insurer does not expect payment at the home office.

It is noticeable that in this instance the obligation says:—

“I promise to pay said company or order (by mail if requested),” etc. Why was the condition inserted that the insured was to pay “by mail if requested” by the company, unless it was the understanding and expectation of the parties to the policy, that unless this request was made the company would provide some agent in this State who would receive the premiums?

It seems to us that a fair construction of the contract requires this interpretation, and as the insurer did not do so, the insured was not in default. The appellant offered to file an amended petition, and did file a reply, in which he alleged that he was ready to pay the premium, but that the company had not notified him how or to whom to pay it, and that he did not know to whom it should be paid; that the local agent of the appellee when he delivered the policy to the appellant, and when the latter executed his obligation to the company, and thereafter and before the installment fell due, told him that he would be notified how and to whom to make the payments, and “that he must not make them in any other way.”

An objection to the filing of the amended petition and a demurrer to the reply were sustained; and hence their allegations must be taken as true; and we must be understood in what we have above said, as assuming the matters therein alleged as facts. It is urged, however, that any evidence of such an agreement with or notice from the appellee's agent would not be admissible. The written obligation is, however, silent as to any place of payment; its terms presumptively show that the appellant was not to seek the appellee out of the State to pay his premium, and the agreement with the company's local agent as to payment was made with the one who had effected the insurance with him, and fixed the time and amount of the payments.

It is true parol testimony is inadmissible to vary or contradict the terms of a written contract; but this rule does not apply where the original contract was verbal and entire, and only a part of it has been reduced to writing; for instance, it may be shown by parol when a written promise without date was made. The parol evidence in this instance of what the agent said to or agreed with the insured

as to payment, was competent, because no stipulation of the policy was waived or contradicted by it, and the appellant had the right under all the circumstances to believe that the agent had the authority to and that he had the right to rely upon him to instruct him as to the manner of paying the premiums; and the company by its course of business and conduct having produced such a belief, cannot be allowed to claim a forfeiture of the policy because the insured has acted upon it.

Judgment reversed with directions to allow the amended petition to be filed—overrule the demurrer to the reply and for further proceedings consistent with this opinion.

UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF OHIO.

EATON

vs.

SUPREME LODGE KNIGHTS OF HONOR.*)

In a suit on a contract of life insurance, with conditions precedent which are referred to on the face of the contract, the burden is on the plaintiff to prove a compliance with such conditions, or a sufficient excuse for non-compliance.

If the excuse be a want of sufficient notice to pay an assessment, plaintiff must prove the insufficiency.

The act of an agent in receiving money at a time not authorized by the rules of the society does not bind the society.

To establish a waiver as to such act, plaintiff must show knowledge and acquiescence on the part of the managing officers of the central society.

In the Knights of Honor, the financial reporter of the local lodge is not an officer of the supreme lodge.

If the member fails to object to a misappropriation of the funds contributed by him, his beneficiary cannot complain thereof.

Such a misappropriation would not excuse the non-payment of subsequent assessments, or justify a member in refusal to pay.

The rule charging with assessments all members who take the final degree "on and prior to" a certain date, makes them liable to contribute to all deaths occurring during that calendar day.

Moneys in the hands of the treasurer of the order, if already legally drawn upon to a less sum than \$2,000, are not "in" the W. and O. B. Fund, so as to prohibit the calling of a new assessment.

It is optional with the local lodges to allow sick benefits, and they are under no legal duty to pay the amount thereof, when allowed, upon the assessments of their members.

* Decision rendered, October 28, 1886.—From *Central Law Journal*.

J. R. VON SEGGERN, and J. J. GLIDDEN, *for Plaintiff.*

JAMES O. PIERCE, and CHANNING RICHARDS, *for Defendant.*

This action was brought upon a certificate issued by defendant to the husband of plaintiff, assuring to her the sum of \$2,000, from the "Widows and Orphans' Benefit Fund," if her husband, Lyman B. Eaton, should die while a member in good standing of the order.

The petition alleges that said Lyman B. Eaton died on the 27th day of April, 1883, being at the time a member in good standing, and that plaintiff is entitled to said sum in accordance with the provisions of her certificate.

The answer denies that Eaton was a member in good standing at the time of his death, and alleges that the constitution and by-laws of the order provide that any member failing to pay an assessment when due, having received thirty days notice thereof, ceases to be a member in good standing; that Eaton having received due notice failed to pay assessment No. 111 when due, and that plaintiff was therefore not entitled to participate in the widows and orphans' fund.

The reply is a general denial of the allegations contained in the answer. The testimony introduced by plaintiff shows that the assessment in question (No. 111) was called December 23, 1882, falling due January 22, 1883, and that it was not paid by Eaton within that time. It also appears that he had received notice of the assessment previous to January 22, but how long previous thereto did not appear.

The delinquency was reported at the ensuing meeting of the local lodge to which he belonged, held on February 1, and his suspension was noted upon the minutes. On February 4, Eaton sent the amount by a messenger to the financial reporter of his local lodge, who received the same without objection at the time, entering credit therefor on Eaton's pass-book, and also upon his own cash-book; but a few days thereafter notified Eaton that he could not receive the money. The entry thereof in the cash-book was erased and the money was not turned over to the treasurer of the lodge, but several weeks afterwards was returned to Eaton. It was claimed on behalf of plaintiff that Eaton was wrongfully suspended for non payment of this assessment, in support of which claim, testimony was introduced tending to show:—

1st. That the financial reporter of the local lodge had previously received assessments from Eaton after expiration of the time allowed for payment.

2d. That Eaton had been suffering with inflammatory rheumatism since the middle of December, and was unable to fully attend to business, for which reason he was entitled to "sick benefits" from his lodge, which should have been applied by the lodge to payment of this assessment.

3d. That Eaton had been unlawfully included in assessment No. 54, which was called upon a death occurring on the same day whereon he became a member, but before the hour; that the money collected from him on that assessment had been paid to the treasurer of the supreme lodge, and should be applied to payment of assessment No. 111.

4th. That when assessment No. 111 was called, there was more than \$2,000 in the treasury to the credit of the widows and orphans' fund, and that the laws of the order do not authorize an assessment until the amount to the credit of that fund is reduced below that sum.

5th. That money derived from assessments in which Eaton was included had been applied to death losses to which he was not bound to contribute.

The constitution and laws of the order were offered in evidence, included in which were the following provisions:—

"No member shall be assessed for a death that occurs prior to his attaining the third or degree of manhood."

"After paying said benefit, if the sum of two thousand dollars is left in the supreme treasury, no assessment will be made, but when less than two thousand dollars is left in the supreme treasury after paying a benefit, then a call will be made on each lodge for the amount of one assessment on all members upon whom the degree of manhood was conferred on and prior to the date of the death of the deceased brother."

"Each member shall pay the amount due, on the notice of the reporter of his lodge, within thirty days from the date of such notice, and any member failing to pay such assessment within thirty days, shall by such failure, stand suspended from membership in the order, and his name shall be so entered and carried upon the books of the reporter and financial reporter of his lodge."

"He (the financial reporter), shall close his account with each assessment at the expiration of thirty days from the date of said assessment, and shall not receive money thereon from any member except the suspended member shall have fully complied with the law governing suspended members."

"Any member in good standing, and not in arrears for dues or fines, having six months previously obtained the degree of manhood, who may become disabled by sickness or other disability, from following his usual business, or some other occupation, may be entitled to receive from the funds of this lodge such weekly benefits (to be paid weekly) as this lodge may in its by-laws prescribe, which may not be less than one dollar per week: provided said sickness or disability has not originated from intemperance, vicious, or other immoral conduct or practice; and the lodge may by by-law enact that no benefits shall be paid for the first week's sickness or disability."

At the conclusion of plaintiff's testimony, the court was asked to instruct the jury to return a verdict for defendant upon said testimony, which motion was fully argued by counsel.

Sage, J., orally instructed as follows:—

The question presented by the motion is, whether the evidence offered on behalf of the plaintiff, allowing to it its greatest probative force, is sufficient to support a verdict.

1. The petition alleges full compliance by deceased with all conditions of the certificate, and that he was a member of the order in good standing at the time of his death. These allegations are denied by defendant, and it is necessary for plaintiff to establish the same by evidence. The burden is upon her to prove that he had complied with the laws governing the order, that being a condition of the certificate; or to show a valid excuse for non-compliance. The evidence she has introduced shows that Eaton did not pay assessment No. 111 when due, and under the laws of the order such non-payment deprives a member of good standing; but she attempts to excuse non-payment on various grounds.

2. The testimony does not show when notice of this assessment was served upon Eaton, but it does show that the assessment was called on December 23, 1882, and was payable on or before January 22, 1883, and if plaintiff relies upon want of due notice to excuse non-payment, she must herself prove it.

3. The receipt of an assessment after maturity is expressly forbidden by the laws of the order, and the receipt of the assessment on February 4, by the financial reporter of the local lodge, was not binding upon defendant, unless authority, express or implied, was given to receive it. No express authority has been shown, but it is claimed the receipt of previous assessments by him from Eaton

after the same were past due, amounted to a waiver of prompt payment. The financial reporter of the local lodge is not an officer of the supreme lodge, or under its control; at most he is only its agent, and to establish a waiver as against defendant, by reason of his previous conduct, it must be shown that the managing officers of the supreme lodge had knowledge thereof, and acquiesced in it. There is no such testimony from which a waiver can be found.

4. It is further claimed that assessment No. 54 was improperly collected from Eaton, and the amount so collected should be credited upon No. 111.

That assessment was called upon a death occurring on the same day Eaton attained the third degree in the order. The laws of the order provide that an assessment shall be collected from all members upon whom the third degree was conferred on and before the date of the death upon which the same is called. Plaintiff has offered testimony to prove that No. 54 was called upon a death occurring at 9 P. M., about an hour before the degree was conferred on Eaton, and for the purposes of this motion that is to be considered as a fact established.

The general rule of law is to disregard fractions of a day. If the circumstances show that it was otherwise intended, such division may be made; but in this case the language of the by-law does not warrant it, and the facts do not require it.

Moreover, no objection was made by Eaton. He permitted the application of his money to that assessment, and it did not remain to his credit in either the local or supreme lodge.

5. It appears that the treasurer of the supreme lodge had a large sum of money in his hands to credit of the widows and orphans' fund, when assessment No. 111 was called; but it also appears that orders had been drawn against it to pay death losses, sufficient when paid to reduce the fund below \$2,000, which authorized the call of a new assessment. It was not necessary to await payment of the outstanding orders; the money on hand having been appropriated to the payment of certain claims it was not in the treasury so as to prevent an assessment to provide for the payment of further claims which had been proved.

6. As to any misappropriations of previous assessments, if any there were, there is no testimony to sustain any claim of plaintiff on that account. Inasmuch as Eaton had acquiesced in such appropriation, she cannot object, and in any event it would not excuse

non-payment of an assessment made to pay claims for which he was clearly liable.

7. As to "sick benefits," their allowance was within the discretion of the local lodge. There is no testimony to show that any such provision had been made by this lodge, and if there were, it was expressly made applicable to other purposes, and could not be applied by the lodge to payment of an assessment.

8. Upon the whole testimony the court finds that no valid excuse has been shown for non-payment of the assessment, and plaintiff has therefore failed to establish the allegations of her petition.

The jury is therefore instructed to return a verdict for defendant. Which was accordingly done.

A motion for a new trial was made on behalf of plaintiff, which, after full argument and consideration, was overruled on March 30, 1886.

SUPREME COURT OF INDIANA.

Appeal from the Floyd Co. Circuit Court.

PRESBYTERIAN ASSURANCE FUND

vs.

MARY E. ALLEN.*

The certificate of a benefit association is in legal contemplation a policy of insurance and governed by the same general rules of law.

Statements in the application must be incorporated or appropriately referred to in the contract to become warranties.

Where the charter of a benevolent association provides that the benefit shall be paid to the party designated in the application, or if that be impossible, to certain other parties named, the rights of the beneficiary become vested when nominated in the application, and the name of such beneficiary cannot afterwards be changed by the member.

Where there is nothing in the charter conflicting, however, the member may perhaps change the beneficiary, but a charter limitation will prevail over any general rule of law.

ELLIOTT, J.

The appellant is a mutual benefit association incorporated by the legislature of Kentucky. Its object, as the charter declares, is "to create and provide a beneficiary fund for the families or relations of deceased members, or for the benefit of members in sickness." The appellee's complaint is based upon a certificate of membership procured from the corporation by William G. Allen in his lifetime. The certificate, although issued by a mutual benefit association, is in legal contemplation a policy of insurance, and is in most respects governed by the general rules of law which apply to insurance contracts: *Baur vs. Sampson Lodge*, 102 Ind., 262; a. c., 1 N. E. Rep., 571; *Elkhart etc. Association vs. Houghton*, 38 Ind., 149; *Supreme Lodge etc. vs. Schmidt*, id., 374. There are, as we shall hereafter see, some essential differences between such contracts as that evi-

* Opinion filed, June 5, 1886.

denced by this certificate and ordinary contracts of insurance; but these differences do not affect the questions arising on the pleadings, which first require our attention. Statements made by the insured in his application for insurance are not deemed warranties, unless they are incorporated in the policy, or in some appropriate method referred to in that instrument: *Com. etc. Co. vs. Monninger*, 18 Ind., 352; *Mutual Ben. Association vs. Miller*, 39 Ind., 475; 3 Kent. Comm., 373; *May, Insurance*, sec. 156; *Bliss, Insurance*, sec. 34.

The statements by the insured in his application are not set forth in the policy, nor in any way is reference made to them, and they cannot be considered warranties. The second paragraph of appellant's answer is based on the erroneous theory that they were warranties, and as this theory is untenable, the answer is bad.

The provisions in the policy issued by the appellant respecting the designation of the beneficiaries is, in substance, that a sum not exceeding \$2,000 shall be paid to such person or persons as he, the insured, may designate by will or upon the books of this corporation. "The insured in his application directed that the amount of the insurance should be paid to his sons, Oscar and William Allen; but subsequently the insured, with the consent of the appellant, but without the consent of the original beneficiaries, designated on its books Mary E. Allen, whom he had married, as the beneficiary. The charter of the association granted by the legislature of Kentucky, provides, among other things, that "upon the decease of any member of this association the fund to which this family is entitled shall be paid as may be designated in the application for membership. This being changed by death, or otherwise impossible, it shall go—first, to the widow and infant children; second, to his mother and sister; third, to his father and brothers; fourth, to his grandchildren; fifth, to his legal heirs." The appellant contends that the designation of the beneficiaries in the application so fixed their rights that they could not be changed without their consent. If this were an ordinary policy of insurance, issued by an ordinary insurance company, this contention would prevail: *Hulson vs. Merrifield*, 51 Ind., 24; *Pence vs. Makepeace*, 65 Ind., 345; *Godfrey vs. Wilson*, 70 Ind., 50; *Wilburn vs. Wilburn*, 83 Ind., 55; *Harley vs. Heist*, 86 Ind., 196; *Damron vs. Pennsylvania etc. Co.*, 99 Ind., 478; *Pennsylvania etc. Ins. Co. vs. Wiler*, 100 Ind., 92; *Chapen vs. Fellows*, 36 Conn., 132; s. c. *Amer. Rep.*, 49; *Glanz vs. Gloeckler*, 104 Ill., 573; *Manhattan Life Ins. Co. vs. Smith*, 5 N. E. Rep., 417; *Bliss, Ins.* (2d Ed.), 540.

These cases are representative of a large class, declaring that in ordinary cases of life insurance the beneficiary designated cannot be changed without his consent. There is much diversity of opinion upon the question as to the applicability of this principle to policies like the one before us, issued by associations of the class to which appellant belongs: *McClure vs. Johnson*, 56 Iowa, 620; s. c., 10 N. W. Rep., 217; *Tennessee Lodge vs. Ladd*, 5 Lea, 516; *Durian vs. Central Verein etc.*, 7 Daly, 168; *Richmond vs. Johnson*, 28 Minn., 447; s. c., 11 Ins. Law J., 215, and 10 N. W. Rep., 596; *Swift vs. Railway Passenger & T. C. Benefit Ass'n*, 96 Ill., 309; *Ballou vs. Gile*, 50 Wis., 614; s. c., 7 N. W. Rep., 561; *Masonic Mut. Life Ins. Co. vs. McAuley*, 10 Wash. Law Rep., 724; *Kentucky Mut. Life Ins. Co. vs. Miller*, 13 Bush., 489; *Catholic Ben. Ass'n vs. Priest*, 46 Mich., 429; s. c., N. W. Rep., 481; *Expressmen's Aid Society vs. Fenn*, 9 Mo. App., 412; *Maryland etc. Society vs. Clendenen*, 44 Md., 429; s. c., 22 Amer. Rep., 52. The weight of authority, as will appear from an examination of the cases cited, is in favor of the general doctrine that beneficiaries may be changed in cases where policies like the one before us are issued by such associations as the present, and that in this respect such policies are not governed by the general rule which governs ordinary insurance contracts. But, granting that this is the general rule, still it cannot prevail if the charter of the association prohibits a change in the beneficiary first agreed upon and designated. It is firmly settled that a contract must be made in the mode prescribed by the corporate charter, and must be one authorized by it: *Ohio Ins. Co. vs. Wunnemacher*, 15 Ind., 294; *Leonard vs. American Ins. Co.*, 97 Ind., 299; *Asbury etc. Co. vs. Ritchie*, L. R., 7 H. L., 653; *Head vs. Providence Ins. Co.*, Cranch, 127. Of the provisions of the charter and by laws of the corporation all who become members are chargeable with knowledge: *Bauer vs. Samson Lodge*, *supra*.

Whatever may be the rule where the charter does not provide a mode of exercising corporate powers, it is quite clear that where the charter does prescribe the mode it must be followed, even though it requires a procedure different from the one prescribed by a general rule of law. Hence it is here of controlling importance to rightly ascertain and decide whether the mode of exercising the corporate power is prescribed, and whether the mode prescribed inhibits the changing of beneficiaries after they have been once designated. The provisions of the charter, as we read them, do prohibit a change of beneficiaries by the act of the insured and in-

suror, for they declare that the benefit shall be paid as may be designated in the application, and that "this being changed by death or otherwise become impossible, it shall go," in the mode which is specifically provided. We can see no way to avoid the conclusion that this charter provision requires the benefit to be paid to the person named in the application, or those specified in case of the death of those persons, or of some occurrence making it impossible to pay it to them. Not only does the charter in direct terms declare that the benefit shall be paid to the persons thus named, but it also declares that, if it becomes impossible to pay it to them, it shall go in the manner specified in the charter. The effect of these provisions is that the beneficiaries named must receive the money due on the policy, or it must be disposed of as provided by the charter creating the association. The provision respecting the mode of disposing of the benefit deprives the insured and the insurer of any right to change the contract, as it leaves only two possible classes of beneficiaries, those named in the application and those specified in the charter, as entitled to take in case the designation in the application "is changed by death, or otherwise becomes impossible." The meaning that must be given the provisions of the charter is that the only change that can be made is such as is caused by death or some other occurrence making it impossible to pay to the beneficiaries designated in the application; for all authority to make a change by their own acts is taken from the insured and the insurer. The only change that can occur is such as is caused by death or some event making it impossible to pay the benefit to the beneficiaries originally named. The change cannot arise out of the voluntary act of the insured and insurer, but must be made necessary by some such event as makes it impossible to pay the beneficiaries named in the application for membership. In our opinion there is no escape from the conclusion that there are only two classes of persons to whom the benefit can be rightfully paid, and these are the beneficiaries named in the application and those specified by the charter as entitled to it in the event that it becomes impossible to pay the beneficiaries originally designated.

In speaking of the question similar to that before us, the Court of Appeals of Kentucky said :—

"The company and Miller could decide the question whether he should become a member, and having done so, from that moment the rights of the beneficiaries attached, subject to be defeated by his failure to comply with the terms of his membership, but upon no

other contingency whatever. If, therefore, the stipulation to pay Miller's heirs should be construed to have been intended to secure the fund payable on account of his membership to his administrator or his creditors, such stipulation could not prevail over the unequivocal provisions of the charter that it shall be paid over to his widow and children."

Discussing the same subject, the Supreme Court of Massachusetts said: "The class of persons to be benefited is designated and the corporation has no authority to create a fund for other persons than the class named:" *Supreme Council etc. vs. Perry*, 5 N. E. Rep., 634.

We have carefully examined such cases bearing upon this question as we have been able to find, and in none of them, except those referred to as sustaining the view we have expressed, do we find any discussion of a charter provision such as the one contained in the act incorporating the appellant. In the cases which hold that the beneficiary may be changed there is either a statutory provision permitting it to be done, or else no provision upon the subject. We have also studied with great care the provisions of appellant's charter, but have been unable to find any provision that modifies the section quoted by us.

Counsel for the appellee refers us to by-law of the association setting forth the form of the certificate that shall be issued to members; but if we were to grant that the form of the certificate thus prescribed sustained appellee's contention that the beneficiaries may be changed, still it would do her no good, for a by-law which is inconsistent with the charter of the corporation is utterly void. This familiar principle is thus expressed in a case closely resembling the present: "If the plaintiff corporation undertook to make by-laws in contravention of the statute they were *ultra vires* and of no effect:" *Hicks vs. Perry*, 5 N. E. Rep., 634 and 638. We are referred to our own statute and informed that it authorizes a change of beneficiaries: *Rev. St.*, 3,848. The infirmity in the argument built upon this statute is that the statute itself, in direct terms, restricts its operation to corporations "organized and incorporated under the laws of this State.

Upon the facts proved the law is with the appellant, for they clearly show that the right of action is in the beneficiaries named in the application, and not in the appellee.

Judgment reversed, with instructions to grant appellant a new trial.

COURT OF APPEALS OF MARYLAND.

Appeal from the Superior Court of Baltimore City.

PROVIDENCE ETC. INS. CO. }

vs. }

ADLER. }

Oil-cloth clothing, insured under a marine policy insuring also against fire, was damaged by spontaneous combustion due to its own proper vice.
Held, That this was not a damage by fire within the policy.

JOHN R. KENLY, *for Appellant*.F. P. CLARK, *for Appellees*.

STONE, J.

The plaintiffs shipped by a line of steamers running from New York to the south, a quantity of oil-cloth clothing to Louisiana and Texas. They insured this clothing before shipment in the office of the defendant company. The clothing was packed in boxes, and on its arrival at its destination, it was found injured and comparatively worthless, either by spontaneous combustion or by some chemical action arising from the material in the goods themselves. They all presented the appearance of having been burned or charred within the boxes. The clothing was not injured by any external force or accident, but whatever the injury was, it was the result of the inherent infirmity of the goods themselves. Neither the plaintiffs nor defendants knew at the time the insurance was effected that the goods were liable to spontaneous combustion, or to be injured by any inherent defect in the goods. No extra premium to cover such risk was paid.

* Decision rendered, March 11, 1886.

Under these circumstances the defendants claim, that by the general principles of insurance law they are not liable for a loss by spontaneous combustion caused by the inherent infirmity of the goods themselves.

This was a marine policy, and one of the dangers insured against, by the terms of the policy, was fire. But while this is undoubtedly so, the question remains, and is still undecided in this State, whether the term "fire" used in ordinary marine policy, will upon general principles cover the case of spontaneous combustion, caused by an inherent infirmity in the article insured, and not the result of accident or peril of the sea. There is no doubt of the liability of the defendant company, under its policy, had the ship taken fire, and the goods been consumed; or had the fire originated from any of the perils insured against; but the question is a very different one, when, as in this case, the goods are in good faith insured and believed, both by plaintiffs and defendant, not to be liable to spontaneous combustion by reason of their inherent infirmity, but which in fact were so liable and were so injured.

The authorities are few upon this subject and neither full nor satisfactory. One of the oldest to which we have access is Emerigon, who says, page 290:—

"Article 12 of another title establishes, as a general rule, that everything which happens through the inherent vice of the thing, or by the act of the owners, master, or merchant shipper, shall not be reputed a peril if not otherwise borne on the policy.

"It is then certain that the insurers never answer for damages and losses which happen directly through the act or fault of the assured himself. It would be in fact intolerable that the insured should be indemnified by others for a loss of which he is the author. This rule is grounded on first principles. It is a general rule, from which it is not permitted to derogate by a contrary agreement. As Pothier remarks, it is evident that I cannot validly agree with any one, that he shall charge himself with the faults that I shall commit."

We do not understand this learned author to mean that an article may not be insured that is inherently liable to spontaneous combustion, or decay, provided it is so expressed in the policy, but not otherwise. But if the loss happens through the fault of the assured, then the insurers are not liable, whatever may be the terms of the policy. For example, if an article is insured, which when dry is not liable to spontaneous combustion, but when he puts it on board, it is

wet, in such case no recovery can be had. Such we understand to be the views of this author.

The next case to which we are referred is the case of *Boyd vs. Dubois*, 3 Camp., 133. In that case Lord Ellenborough said: "If the hemp was put on board in a state liable to effervesce, and it did effervesce and generate the fire which consumed it, upon the common principles of insurance law the assured cannot recover for a loss which he himself has occasioned."

The defendant in that case attempted to prove that the hemp which was insured was put aboard ship in a damaged condition; and for that reason was apt to ferment and take fire.

This case is in accord with Emerigon. The next authority, Parsons in his work on Contracts, 2d vol., page 374, 6th edition, where he says:—

"It is another rule that insurers are not liable for property destroyed by the effect of its own inherent deficiencies or tendencies, unless these tendencies are made active and destructive by a peril insured against. Thus if hemp which was dry when laden, be afterward wet by a peril of the sea, and by reason of such wet ferments, or rots, or burns, the insurers would be liable."

And that very learned author refers to both Emerigon and the case of *Boyd vs. Dubois* as his authorities. Chancellor Kent also takes a similar view in his commentaries: 3 Kent, chap., 48. Phillips on Insurance, chap. 13, marg., page, says: "It is a general rule that insurers are not, under the common form of the policy, liable to any damage or loss arising from the qualities or defects of the subject insured, since these are not among the perils assumed by the underwriter."

Parsons, on the law of Marine Insurance, vol. 2, page 216, holds the same view. He says: "It is also a rule that the insurers are liable for no subject-matter of insurance, which is destroyed by reason of its own inherent defects or tendencies. But this rule does not apply to tendencies which are called into activity only by a peril insured against. Thus, if hemp insured burns up, or rots from spontaneous ignition or fermentation, it being known that this may happen if the hemp be damp, but not if it be dry, the question would be, whether it was damp or dry when it was put on board. But if the hemp were dry when laden, and was afterward wet by reason of the straining of the ship in a storm or by the shipping of a sea, or any like peril, then the insurers whether on ship or cargo would be liable."

All these authorities refer to Emerigon and the case in 3 Camp., and are all upon marine insurance. On the other hand, we have been referred to the case of *British American Ins. Co. vs. Joseph*, decided in the court of appeals for Lower Canada, which has been supposed to decide that a fire insurance—not marine—covers the risk of spontaneous combustion, and citing that case only, Mr. May, in his work on fire insurance, comes to the same conclusion. The Lower Canada case is certainly very imperfectly reported. The report is in French, and the court gave no opinion, the terms of the policy are not set out, and but a very few of the facts in the case. It is by no means clear, from the few facts that are stated, that the spontaneous combustion did not originate in a heap of uninsured coal, and extend from that to the insured coal.

But suppose the case has all the effect claimed for it by the appellee, and does decide that in a purely fire insurance that the risk of spontaneous combustion is covered, we could not agree that it should overrule the long list of high authorities to the contrary in marine policies. More especially since the reasons to the contrary we think are satisfactory. No well-managed insurance company would take a marine risk, on an article inherently liable to spontaneous combustion; nor would any prudent shipmaster or owner receive such on his vessel, as not merely the property so insured but the property of others, and the safety of the ship and lives of the crew, would be endangered by so doing. It would, as Emerigon says, be intolerable that the owner should receive pay for goods that destroyed themselves. The object of a marine policy is to insure against the perils of the sea, and not against the perils incident to the goods themselves.

In this case it is very clear that the goods were injured by their own inherent infirmity, and that such inherent infirmity was not called into activity by any peril insured against. We think such loss was not within the contemplation of either party to the contract of insurance. That the term "fire," used in the policy, included fire from accident, or brought about by a peril of the sea, and not spontaneous combustion. Entertaining these views, we think the court below were in error, in granting the fourth prayer of the plaintiff, and in refusing the first prayer of the defendant, and the judgment must be reversed. But inasmuch as the evidence is full and explicit, that the injury was caused by the inherent infirmity of the goods, a new trial will not be awarded. Judgment reversed.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

ELLIOT FIVE CENTS SAVINGS BANK

VS.

COMMERCIAL UNION INS. CO.*

The policy was payable to the mortgagee. The latter, by agreement with the mortgagor, began repairs needed to protect the property from further damage before the expiration of the time within which the company might elect to repair.

Held, That in the absence of any subsequent proposal by the company to repair, the right to recover damages for the loss was not defeated.

Held, That a tender of the amount due on the mortgage with interest is not sufficient to entitle the company to claim an assignment of the mortgage after suit has been begun.

Held, That such a tender should also include the sum expended for repairs, for which the mortgage was entitled to re-imbursement.

J. L. THORNDIKE and H. G. ALLEN, *for Plaintiff*.

M. & C. A. WILLIAMS, *for Defendant*.

MORTON, C. J.

By the policy in suit, the defendant insured "George B. Taylor, payable in case of loss to Eliot Five Cents Savings Bank, mortgagees, as interest may appear" on the Hotel Clifton, in the sum of \$5,000, for five years from July 1, 1881. The policy is in the standard form, provided by the Public Statutes, chapter 119, section 139, and the statute of 1881, chapter 166, section 1, and contains the provision that "if this policy should be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee, or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real

* Decision rendered, June 30, 1886.

estate, provided that the mortgagee shall, on demand, pay according to the established scale of rates for any increase of risk not paid for by the insured; and whenever this company shall be liable to the mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor or owner, and this company shall elect by itself or with others to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debt thereby secured."

The policy also contains the provision that, in case of any loss or damage, the company, within sixty days after the statement or proof of loss, "shall either pay the amount for which it shall be liable, or replace the property with other of the same kind and goodness, or it may, within fifteen days after such statement, notify the insured of its intention to rebuild or repair the premises, or any portion thereof separately insured by this policy, and shall thereupon enter upon said premises and proceed to rebuild or repair the same with reasonable expedition."

The building insured was damaged by fire on November 29, 1883, and within a few days thereafter, an agent of the defendant and an agent of the plaintiff examined the premises and appraised the amount of loss at \$4,488, to recover which sum this suit is brought, the writ being dated June 16, 1884.

At the time the policy was issued and at the time of the loss, the plaintiff held a mortgage upon the premises to secure the note to the said George B. Taylor for \$12,500. On December 26, 1883, the plaintiff delivered to the defendant a proof of loss, signed and sworn to by Abbie E. Taylor, to whom George B. Taylor had conveyed the premises since the policy was issued. And on March 22, 1884, more than sixty days before this suit was brought, the plaintiff delivered to the defendant another proof of loss, signed and sworn to by the assured, George B. Taylor. The defendant received and retained both of these proofs without objection, and though twice asked in writing to inform the plaintiff if it required or wished for any further statement, remained silent and made no reply. It must be held to have waived any defects in the proof of loss, if any existed.

If we assume, as claimed by the defendant, that the conveyance by George B. Taylor to Abbie E. Taylor, without the assent of the company, avoided the policy, as to them, yet under the first clause above cited, it would not affect the right of the mortgagee to recover.

But the defendant relies upon two grounds of defense. One is that the plaintiff by its acts in entering upon and repairing the premises, immediately after the fire, deprived the defendant of the right to elect to rebuild or repair the premises within fifteen days after the proof of loss.

It appears that nine days after the fire and after the agent of the defendant had examined the premises and appraised the loss the plaintiff began to repair the premises. Immediate repairs were necessary in order to prevent further damage. The repairs were finished March 28, 1884, and it is admitted were reasonable and proper for the protection of the property.

The policy provides that the company shall pay the loss within sixty days after the proof of loss, or it may, within fifteen days after the proof of loss, notify the insured of its intention to rebuild or repair the premises.

The fact that the plaintiff had commenced making repairs without notice did not deprive the defendant of its right to notify the plaintiff of its intention to repair the premises.

If the defendant had done so and found that the insured was making repairs without any notice to it, both acting in good faith, it might be difficult to adjust the rights of the parties. But there is nothing to show that the defendant ever entertained the intention to repair. It has never notified the insured of such intention, and it is clear that the acts of the plaintiff, in making necessary repairs in good faith, ought not, upon any principles of law or justice, defeat the right to recover its actual loss.

The other ground of defense is that the defendant tendered to the plaintiff the amount secured by its mortgage, and demanded a transfer of the mortgage and note, which the plaintiff refused. The facts agreed are that "on January 20, 1885, the defendant made a legal tender to the plaintiff of the amount of the principal of the mortgage—\$12,500—and accrued interest thereon, due upon said day, and requested the plaintiff to assign, transfer, and deliver to defendant the mortgage and note, which plaintiff declined to do."

We think there are two answers to this defense. The statute and the policy give the company the right, in a case where it is not liable to the mortgagor or owner, to elect either to pay the mortgagee the loss or to pay the full amount secured by the mortgage, and to receive an assignment of the mortgage and debt; but the law implies a condition that this right of election shall be exercised within a reasonable time.

In the case before us the defendant denied its liability to pay the loss, compelled the plaintiff to bring this suit, filed an answer denying any liability on its part, and seven months after the suit was brought made the tender upon which it relies.

If this tender is sufficient, it must follow that any tender made before judgment in the suit, would defeat the plaintiff's right to recover. The result would be to throw upon the plaintiff all the costs and expenses of the suit, which would be unreasonable and unjust.

We are of opinion that the tender made by the defendant was not made within a reasonable time and was too late to be of avail as a defense to this suit. We are also of opinion that the tender was not sufficient in amount. The defendant was required to tender "the full amount secured by such mortgage" at the time the tender was made. The plaintiff had, before the tender, made large expenditures, necessary to protect the property and prevent further damage to it. The fire rendered the plaintiff's security insufficient to cover its debt. The mortgagor and owner of the equity were unable to make repairs, and the plaintiff did so at their request. We cannot doubt, under the circumstances, the mortgagor and his assigns would in equity be liable to pay whatever the mortgagee had reasonably spent to protect the property and uphold the security, and that the full amount secured by the mortgage includes such expenditures.

For these reasons we are of opinion that the plaintiff is entitled to recover the full amount of the loss. Judgment affirmed.

SUPREME COURT OF PENNSYLVANIA.

SOMERSET COUNTY MUTUAL FIRE INS. CO. }

vs. }

USAW.* }

The policy insuring as "occupied by tenant" provided that it should be void in case of any change as to tenants or occupancy without notice.

Held, That the vacancy of the premises for six weeks before the fire was not a violation of the provision.

Held, That the vacancy was not a use for other purposes than those named.

Held, That evidence to prove arson as a defense need not be so strong as required for a criminal conviction.

MESSRS. COFFROTH & RUFFEL, and WILLIAM H. KOONTZ, ESQ., *for Plaintiff in Error.*

VALENTINE HAYS, ESQ., *for Defendant in Error.*

The contract of insurance was upon a dwelling-house, with store-room, "occupied by a tenant for dwelling and store," and contained a stipulation, that "if any change be made as to tenants or occupancy of these premises, without being notified to this company and indorsed upon their policy, then this insurance to be void." It was also agreed, that if the premises "be so altered or appropriated, applied, or used, to or for the purpose of carrying on or exercising therein any trade, business, or vocation, which, according to the by-laws, added conditions, class of hazards or rates hereto annexed, would increase the hazard, unless it be by the consent and agreement, in writing, of this corporation, then and from thence-

* Decision rendered, March 1, 1886.

forth, so long as the same shall be so appropriated, applied, or used, this policy shall cease and be of no force."

At the time of the fire, and for six weeks previous, the premises were unoccupied. There was no alteration, no change of use, after the date of insurance. Perhaps the risk was increased when the house became tenantless, but it was not agreed that the policy should cease when use or occupancy of the premises ceased. When the tenant moved out there was no change made by the carrying on of any other trade, business or vocation on the premises. Nor was there a change as to tenants or occupancy. No condition or provision is in the policy relative to the premises being unoccupied. When the insurance is on an occupied dwelling-house, without more, there is no agreement or promise that it shall remain occupied. "It is vain to argue that no use at all is a use for other purposes than those for which the building was used when insured." The policy did not bind the assured to any use further than that, when used, it should be only as a dwelling-house and store: *Insurance Co. vs. Douglass*, 58 Pa. St., 419.

This policy contains neither warranty nor condition that the premises should be occupied unless, upon notice, the assurer should consent to their becoming vacant. Hence, the ruling in *Insurance Co. vs. From*, 100 Pa. St., 347, does not apply to this case. for in that a condition of the policy was: "Any building insured by this policy, becoming vacant or tenantless for a period of fifteen days, notice must be immediately given to the secretary, and his consent obtained thereto in writing, otherwise the policy shall be void."

The first and second assignments are not sustained.

Respecting one ground of defense, the jury were instructed that the testimony to establish the fact that John Usaw burned the house must be as strong as would be required to convict him in a criminal court on a charge of arson. That we think was error, and for that only must the judgment be reversed.

The doctrine that a reasonable doubt of guilt is to work an acquittal does not apply in civil issues; in these, the result should follow the preponderance of evidence, even though the result imputes a crime: *Wharton's Law of Ev.*, § 1,246. In reference to the rule thus stated, text books and adjudications differ, and it would be difficult to ascertain on which side is the greater number. Many of them, for and against, are cited by Dr. Wharton, and we are content to refer to them without a profitless review, or a reiteration of reasons leading to the conclusion adopted.

In a civil issue, the life or liberty of the person whose act is sought to be proved is not involved, proof of the act is only pertinent because it is to sustain or defeat a claim for damages, or respecting the rights of things. Where the act imputes a crime, the inculpatory evidence must be sufficient to overcome the exculpatory evidence and the presumption of innocence; otherwise there is no preponderance to establish the fact. That presumption is due every man in every court, and when it is alleged that he has done a dishonest or criminal act, the presumption weighs in his favor. In the civil issue he is not on trial. The judgment is not evidence that he is guilty of crime. The act affirmed is an incident, a fact to be proved like other pertinent facts. For instance, in this case, had the insured changed the tenancy or occupancy of the premises, without notice to the assurer, proof of the act would have been competent, and the fact established by preponderance of evidence. If a man by deceit fraudulently obtains insurance on a building, by like evidence his act may be established to avoid the policy; if he burns the insured building, the same rule of evidence ought to apply when it is proposed to prove the act for like purpose.

When considering the motion for a new trial, the learned judge of the common pleas became satisfied that he had misinstructed the jury as to the strength of evidence required, and thought the rule in Pennsylvania is indicated in *Continental Ins. Co. vs. Delpauch*, 82 Pa. St., 225, where it is said: "The mere fact of death in an unknown manner creates no legal presumption of suicide. Upon evenly balanced testimony, the law assumes innocence rather than crime. Preponderating evidence is necessary to establish the latter." But he held that the error was immaterial, for the reason that the evidence would not warrant a finding that John Usaw burned the house. That was not his view of the evidence at the trial, nor of the able counsel for the plaintiffs.

A glance at the testimony, without comment, reveals that there was no mistake in submitting it to the jury. The house was insured for \$2,300, and rented for \$60 per annum. It was unoccupied, was fired by an incendiary, and the fire was first observed a little after midnight on Sunday morning. Usaw was then living at Harrisburg, but came into the neighborhood a few days before the fire. One witness met and conversed with him near the house about nine o'clock on Friday evening, when he said he was going to Morgan's—he did not go there. Some time after the fire, he

told the same witness that he did not tell the truth that night, and then spoke of the loss of his pocket-book. Two witnesses saw him at the house on Saturday afternoon; one of the two heard some person in the house, and, after the fire, Usaw tried to persuade him that he had heard no one in the house that afternoon. Between four and five o'clock on Saturday afternoon he passed the toll-gate and inquired of the keeper the way to Johnstown, and went the way as directed. The next morning, Sunday, between seven and eight o'clock, the keeper of the same toll-gate saw him pass, going in the same direction as he went on the afternoon before, but he did not speak.

Concede that the exculpatory evidence was strong, and, if believed, established an alibi, still the question of fact was for the jury.

Judgment reversed and venire facias de novo awarded.

SUPREME COURT OF NEW HAMPSHIRE.

BARTON

vs.

PROVIDENT MUT. RELIEF ASS'N.*

Where the by-laws of a mutual benefit association, in the nature of a life insurance company, provide that upon the death of a member the benefit shall be paid to his direction, the member may change the beneficiary by surrendering his certificate of membership and procuring a new one made payable to the person therein named.

The first case is covenant broken, to recover \$2,000 as a benefit payable upon the death of George C. Barton.

The second is assumpsit to recover the same benefit.

Facts agreed.

August 16, 1881, George C. Barton made application to the defendant for membership. In this application was the following: "I wish this benefit to be paid to my wife, Sarah A. Barton." A certificate of membership in due form was issued to him, August 17, 1881, numbered 1,629, which contained the following: "In accordance with the provisions and laws governing said association, a sum not exceeding \$2,000 will be paid by the association as a benefit, upon due notice of his death, and the surrender of this certificate, to such person or persons as he may, by entry on record book of the association, or on the face of this certificate, direct said sum to be paid, provided he is in good standing when he dies."

At the date of the issue of this certificate the name of Sarah A. Barton was entered on the record books of the defendants, as the person to whom the benefit was to be paid upon his death.

* Decision rendered, December 12, 1886.—From *Eastern Reporter*.

VOL. XV.—50.

February 3, 1883, the above certificate was surrendered by George C. Barton to the company, and a new one bearing the same date and number, and called a "duplicate" issued in its place. This last certificate contained the following: "In accordance with the provisions and laws governing said association, a sum not exceeding \$2,000 will be paid as a benefit, upon due notice of his death and the surrender of this certificate, to his parents, James A. Barton and Betsey T. Barton, equally, provided he is in good standing when he dies."

On the right hand margin was the following: "This certificate must accompany the receipt of death benefit."

On the left hand margin, "To change beneficiaries, a new certificate will be issued by surrender of this."

This certificate was signed by the president and secretary, and under seal.

George C. Barton died January 2, 1884, leaving his wife, Sarah A. Barton, and his parents, James W. Barton, and Betsey T. Barton, and a minor son, surviving.

Both plaintiffs claims the \$2,000. The defendants admit their liability to pay \$2,000; and it is agreed that the deposit of that sum to meet the judgment in this suit in some saving bank in Concord, shall relieve the defendants from further claim for costs or interest.

Judgment to be rendered in favor of the party entitled to the same. The charter and by-laws of the defendants are made part of the case.

CHASE & STREETER and NATHANIEL E. MARTIN, for Sarah A. Barton.
T. C. EASTMAN, for J. W. and Betsey T. Barton.
BARNARD & BARNARD, for the Association.

ALLEN, J.

The mutual contract between the husband of the plaintiff, Sarah A. Barton, and the defendant association, provided for a consideration to be paid as a condition of the membership and further sums to be paid annually and at other times as assessment, by one party, and a sum not exceeding \$2,000 to be ascertained by rules certain, to be paid by the other party, on the death of the member, to any person designated by him, and is in form and substance a contract of life insurance. *May on Ins.*, 1; *Commonwealth vs. Wetherbee*, 105 Mass. 149.

The contract, though one of life insurance, must be interpreted according to its terms, in view of the laws of the defendant associa-

tion and of the evident understanding of the parties. The by-laws provide, that "where a member dies, the association shall pay, within sixty days, to his direction, as entered upon his certificate of membership, the sum of \$2,000," if the death assessments amount to that sum. The certificate of membership provides, that "in accordance with the provisions and laws governing said association, a sum not exceeding \$2,000 will be paid by the association as a benefit, upon due notice of his death and the surrender of the certificate, to such person or persons as he may, by entry on the record book of the association, or on the face of this certificate, direct said sum to be paid, provided he is in good standing when he dies." The power of direction as to the object of the benefit is given to the member both in the by-laws and certificate of membership, and there is nothing in either tending to show that the power is to be exercised at the time of becoming a member, or that, when exercised, the power is exhausted and another beneficiary cannot be substituted. The power of selection is unlimited as to persons, and is limited in time only by the death of the member. The certificate remains in the possession and control of the member until death, and the provision for paying the benefits to the person named in the certificate at the death of the member, as then appears, leaves the power to appoint the beneficiary continuous until that event. The power of appointment is the one thing in the contract, which is given to the members, and over that power no other person has any control. The right of its free exercise requires its continuance until death. The appointment by Barton of the plaintiff, his wife, to the benefit, at the time he became a member, was no bar to his right to appoint another or others by a subsequent change. She was no party to the contract, and acquired no vested right in the benefit. The contract was between Barton, her husband, and the defendant, which on the preformance of the conditions of membership, agreed to pay the benefit to any person whose name might appear by his entry on the record book or the face of the certificate at his death. The power of appointment being free and continuous, no right to the benefit could vest in the plaintiff until it became certain that her name remained in the certificate as beneficiary at her husband's death. If by the entry of her name as beneficiary, the plaintiff acquired any interest whatever in the benefit, it was only a contingent interest which her husband had the power to defeat, and which he has defeated, by exercising the power of substitution in the appointment of other beneficiaries.

Chapter 175, Gen. Laws, which give the benefits of life insurance to the beneficiaries named in the contract to the exclusion of the creditors and personal representatives of the assured, does not attempt to control or interpret contracts of insurance, but protects beneficiaries, whoever they may be found to be, and has no application here. The plaintiffs, James W. and Betsey T. Barton, are entitled to the fund. There must be judgment for the defendants in the suit of Sarah A. Barton, and for the plaintiffs in the suit of James A. and Betsey T. Barton. Judgment accordingly.

Smith, J., did not sit ; the others concurred.

SUPREME COURT OF MICHIGAN.

BARRY

vs.

BOSTON MARINE INS. CO.*)

A yacht was insured by an agent who had no authority to insure hulls under a short certificate which referred to an open policy. The latter proved to be a cargo blank filled in, and contained no appropriate language covering a vessel's hull.

Held, That the insurance was invalid, the insured should have examined his contract.

SMITH, NIMS, HOYT & ERWIN, *for Plaintiff*.

DELANO & BUNKER, *for Defendant and Appellant*.

CAMPBELL, C. J.

Barry sued defendant as an insurer for the loss of a steam yacht which foundered while in tow of a larger steamboat, on a trip from Muskegon to Waukegan, on the night of November 7, 1884. The defense, in chief, is a denial of any authorized insurance. The declaration itself involves somewhat the difficulty relied on. It declares on a short certificate, headed with the name of the agency of defendant, certifying that plaintiff is "insured under, and subject to the conditions of open policy No. 2,273 of the Boston Marine Insurance Company, the sum of five hundred dollars on the steam yacht, the *Vane*, towed behind the steam barge *R. G. Ingersoll*

* Decision rendered, July 15, 1886.

from Muskegon, Mich., to Waukegan, Ill. Loss payable to the order of Thomas Barry. This certificate to be surrendered on payment of loss. Muskegon, Mich., November 7, 1884. [Signed] George R. Lewis & Co., Agents."

This certificate having been set out, no further reference is made to any policy, and the remainder is taken up with recitals of loss and proofs. Defendant pleaded, and subsequently was allowed to file an affidavit of denial, under which the plaintiff was put to proof. The evidence tended to show the reception by Lewis & Co. of five dollars premium, the execution by them of the certificate, and the loss of the yacht.

This certificate, standing by itself, has no definite meaning; and as it refers expressly to a certain policy named, it can only be construed under that policy. As declared on, it means nothing, as it contains no reference to the risks covered, nor to the conditions imposed on both parties, nor to the time of the insurance. No company could insure in such a vague way, and no agent could be presumed to have any such discretionary authority. Read with the policy, it makes out such action as was had, and we shall not look at the inferior and accidental questions, which, in our view, become material only in case the main difficulty should disappear.

Lewis & Co. held their authority under a written commission, which gave them no power to issue policies except such as were signed by the president and secretary, and under the rules and regulations of the company, and subject to its instructions. The record in this case is bare of any proof of broader authority, and it contains nothing to warrant the inference that action by the agent beyond this was ever expressly or tacitly sanctioned. An agent can only bind a company where he has either real or apparent authority, and in this case there was no apparent authority substantially varying from the real: *Security Ins. Co. vs. Fay*, 22 Mich., 467; *Reynolds vs. Continental Ins. Co.*, 36 Mich., 131; *Hartford Fire Ins. Co. vs. Reynolds*, id., 502.

In the present case it appeared that the agent had never before undertaken, of his own responsibility, to insure a vessel's hull, but that in all such cases the manager at Chicago looked into the matter, and fixed the rates, if approved. In June, 1884, at the request of a previous owner, Mr. Lewis applied to the manager to learn whether he would insure this same yacht, to be sent from Muskegon to Cheboygan in a few days, and mentioning that she was too small to be found in Lloyd's. Nothing was said as to towage. Mr. White, the

manager, offered to insure the trip risk at 1 per cent. The testimony shows—what we must know judicially—that November risks are greater than those in June. The agent had no blanks for insuring hulls furnished him without approval. He had blank certificates for insuring cargoes, but they all referred to an open cargo policy, which was issued in his name, with the usual conditions and terms of cargo insurance, and required each risk to be indorsed. The present certificate was on a printed blank for the insurance of cargo under deck, on board some vessel to be named in it, and referred to the open policy for the conditions. The words, “under deck, on board the,” were erased by the agent with a pen, and in place of them he inserted “the steam yacht the *Vane*, towed behind the steam barge *R. G. Ingersoll*.” This policy is headed “Inland open cargo,” insuring George R. Lewis & Co., as insured, “on account of whom it may concern.” It insures “all kinds of lawful goods, wares, merchandise, and produce, laden on board the good vessel or vessels, boat or boats, railroad or carriage, lost or not lost, at and from ports and places to ports and places, on a lawful and regular route and voyage, for the several amounts, and at the rates as hereon indorsed, subject to the conditions of this policy,” etc. The risk was to attach immediately on the loading, “and so shall continue and endure until the same shall arrive and be safely landed at the port of destination,” etc. The risks and conditions are not those which are usual and requisite in vessel insurance, but refer throughout to the carriage of goods. The risk is limited to cargo under deck, unless otherwise specifically provided, and deck cargoes, when insured, are made subject to important differences. Cargoes under or on deck are the only articles provided for.

There is no rule of construction that could include a yacht in tow under the description of cargo, and, if insured at all, it must have been without any limitations. No agent can be presumed to have authority to make such insurance, if he should attempt it. But this certificate undertakes to bring under the policy something entirely foreign to its provisions, and cannot be sustained. If made by a person having unlimited authority, it is possible that an insurance might be made to attach on some terms to save the contract. But this was wholly unauthorized, and the plaintiff, who was bound to look at the policy which it embodied by reference, was thereby notified of its worthlessness. The general agent knew nothing of the attempt to insure until he also learned the loss. We find nothing to show waiver or approval.

The declaration, as already suggested, makes out a cause of action, for it does not define what sort of insurance was given, whether fire or marine, nor on what terms or conditions. It might have been amended if there was any ground for it, but as no cause of action was made out, and no amendment could aid it, we see no reason for awarding a new trial.

The judgment must be reversed, with costs of both courts.

The other justices concurred.

SUPREME COURT OF IOWA.

Appeal from Pottawattamie Circuit Court.

BAILEY AND OTHERS

vs.

MUTUAL BENEFIT ASS'N.*

An abstract purporting to be an abstract of all the evidence, two certificates of the court below, filed therewith, showing that a bill of exceptions had been signed, must be sustained upon appeal as what it purports to be, in the absence of an additional abstract of the appellee.

A mutual insurance company, after demanding, receiving, and retaining, until after the death of a member, money equal to the assessment due from him, cannot claim that the money was taken by mistake, and that the certificate is forfeited.

An action at law upon a certificate of mutual insurance cannot reach questions outside of such certificate, so as to enable the plaintiff to recover benefits otherwise than as specified in the certificate.

Action to recover upon a certificate of membership in the defendant company. There was a trial to the court, and judgment was rendered for the plaintiff. The defendant appeals.

FLICKINGER BROS., for Appellant, Mutual Ben. Ass'n.

M. REMLEY and C. H. SCOTT, for Appellees, Joseph Bailey and others.

ADAMS, C. J.

The plaintiffs averred that they are the legal heirs of Vincent J. Bailey, deceased; that he died intestate; and that at the time of his death his life was insured in the defendant company by a contract by which it agreed to pay his heirs "the net proceeds of one full assessment upon all members in good standing at the date of his

* Opinion filed, April 21, 1886.—From *N. W. Reporter*.

death, not to exceed \$3,000." The defendant pleaded a general denial, and also that the contract of insurance had lapsed by non-payment of an assessment.

1. Before proceeding to the determination of the other questions involved, it is proper that we should say that the plaintiff filed a motion to strike the evidence from the abstract because it does not appear that the evidence was incorporated in any bill of exceptions properly signed by the judge. By an amendment to the abstract the defendant sets out two certificates made by the trial judge, from which it appears that a bill of exceptions was signed. The abstract purports to be an abstract of all the evidence, and, in the absence of an additional abstract of the appellee, we must assume that the evidence was made of record, and that it is before us.

2. As to whether there was a default by the deceased in the payment of an assessment we need not determine. There was evidence tending to show that before the death of the deceased the company received the amount of the assessment. The court below, we may presume, so found, and the evidence was sufficient to sustain the finding. It is, to be sure, insisted by the defendant that the money was demanded and received by mistake, the real intention being to regard the certificate as forfeited. But we do not think that such mistake, if made, could be regarded as material. The defendant received and held the money until after the death of the deceased, and he had a right to regard the contract as in force regardless of any intention of the defendant to the contrary.

3. The contract called for the net proceeds of an assessment not to exceed \$3,000. The assessment contemplated, it appears, is an assessment made in advance of the death which gives rise to the liability. Article 14 of the articles of incorporation is as follows: "The amount due and payable under any certificate of membership by reason of death of member named therein shall be the net amount collected on the advance assessment previous to the death of a member, and received at the principal office of the association, which amount shall, in no case, exceed \$3,000." There is no pretense that there is any averment in the petition as to what the proceeds of an assessment were as called for by the certificate, nor what the net amount of an assessment was as provided in the articles of incorporation, nor that there was an assessment at all. The plaintiffs, indeed, claim there was no assessment, and their theory is that they are entitled to recover outside of the terms of the contract, to wit, the gross amount of what an assessment would have been if it

had been made. But, in our opinion, their position cannot be sustained. This is a mutual association. It does not appear that it has any funds with which to pay claims except the proceeds of assessments. One assessment, and only one, can be made to pay one claim, and each assessment, when made and collected, becomes a special fund, and this fund is virtually appropriated in advance. In the absence of an assessment made for the payment of the claim in question, it would be impossible to pay it without using a special fund, virtually otherwise appropriated, for the payment of another claim. If it be true, as contended, that no assessment was made to pay the claim in question, the plaintiffs, probably, are not without their remedy. But their remedy is, manifestly, not an action at law to recover what would be the amount of an assessment if made. In an action at law upon the certificate the plaintiffs must bring themselves within the terms of the certificate. They have not done so, either by the averments of their petition or by the evidence introduced. They rely upon *Neskern vs. Northwestern Endowment Ass'n*, 30 Minn., 406; s. c., 15 N. W. Rep., 683; but the contract in that case appears to have been materially different.

The judgment of the court below must be reversed.

BECK, J. (dissenting).

The policy obligates the defendant to pay to the heirs of the assured "the net proceeds of one full assessment, at schedule rates, upon all the members in good standing at the date of said death [of assured], to an amount not to exceed \$3,000." Article 14 of the articles of incorporation provides as follows: "The amount due and payable under any certificate of membership, by reason of the death of the member named therein, shall be the net amount collected on the advance assessment previous to the death of a member, and received at the principal office of said association, which amount shall in no case exceed \$3,000." The by-laws of defendant contain the following provisions:—

"Sec. 19. One assessment shall be paid in advance. No assessment will be made when the funds in the treasury are sufficient to pay a matured claim."

"Sec. 21. Dues and assessments must be paid within thirty days from date of notice. If not paid within the time specified, the certificate will lapse, and all money paid shall be declared forfeit, and the mutual obligations shall cease."

The evidence shows that at the date of the death of assured the

number of members was 1,336. The assessment was one dollar upon each member. There was evidence showing that each member paid the advance assessment; yet, in the absence of evidence that such assessment had not been paid, it is to be presumed that the laws of the association were obeyed, and that each member paid his assessment in advance of the death of any member, thus keeping in the treasury of the defendant a sum equal to one dollar for each member. This presumption surely arises, and it was the duty of defendant to show, by proof, that the facts were otherwise. Plaintiff was not required to add proof to this presumption. The circuit court well found that there was in the treasury of the defendant \$1,336, which under the policy, it had contracted to pay to the heirs of the insured. It will be observed that this contract is not conditional upon payment of assessments by the members. It is absolute. A judgment, therefore, was properly rendered against defendant for the sum presumed to be realized from the assessments.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

ELSEY

vs.

ODD FELLOWS' MUTUAL RELIEF
ASSOCIATION.*

The general laws of Massachusetts regarding life insurance companies do not apply to benevolent associations and the funds of the latter are not attachable by creditors.

The by-laws of such an association provide that the balance of a benefit "shall be paid to the person or persons designated by the member in his application for membership or last legal assignment, provided such person or persons are heirs or members of the decedent's family.

Held, That the word heirs must be construed in a limited sense as applying to such as were entitled to inherit, not such as might under changed circumstances possibly inherit.

Held, That where the wife was originally designated, the member could not afterwards change to his mother, who was not dependent on him, but lived separately with her husband.

Bill in equity by George Elsey, a member of the Odd Fellows' Mutual Relief Association of Connecticut River Valley, and by Addie E. Wetmore, the widow of a deceased member, to restrain the payment of a benefit in said association to Abigail C. Wetmore, the mother of the said deceased member.

A. M. COPELAND, for Plaintiffs.

E. H. LATHROP, for Defendants.

MORTON, C. J.

The defendant is an association, organized under the statute of 1874, chapter 375. This statute was amended by the statute of 1877, chapter 204, and the two statutes have been continued and re-

* Decision rendered, July 2, 1886.

enacted in chapter 115 of the Public Statutes. The statutes provide that such associations may "for the purpose of assisting the widows, orphans, or other dependents of deceased members, provide in their by-laws for the payment by each member of a fixed sum, to be held by such associations, until the death of a member occurs, then to be forthwith paid to the person or persons entitled thereto, and such fund so held shall not be liable to attachment by trustee or other process."

It authorizes an association of a peculiar character. Its object is to enable a man to lay aside a portion of his income or property, in the nature of an insurance upon his life, to be applied at his death to the use of his widow, orphans, or other persons dependent upon him. But the provisions of the general laws relating to life insurance companies do not apply to the association; the fund held by it is not attachable by the creditors of the member, and by clear implication of the statute, after he has set it aside, he loses the absolute control over it which he has over his other property; he cannot assign it and divert it from the class of beneficiaries described in the statute, and direct its disposition to other persons outside of that class.

It was clearly the intention of the defendant corporation to conduct its business under the authority of these statutes, though the agreement of association and the by-laws do not follow the exact words of the statutes. The corporation is formed "for the purpose of defraying the expenses of the sickness and burial of its members and rendering pecuniary aid to the families of deceased members or to their heirs." And the by-laws provide that the benefit a member is entitled to at his death shall be applied to the payment of the expenses of his last sickness and funeral, if not otherwise paid, and "the balance shall be paid to the person or persons designated by the member in his application for membership, or last legal assignment, provided such person or persons are heirs or members of the decedent's family." But the by-laws should be construed with reference to the statute, and if practicable, such a meaning should be given to them as will make the two consistent, for it is not to be assumed that the by-laws are intended to go beyond the scope of the statute, and thus violate its provisions. The two descriptions of the class of beneficiaries in the statute and in the by-laws would ordinarily include the same persons if the words "heirs" in the by-laws is construed in its natural sense as meaning those who, at the time of the designation, would be the heirs or distributees of the member.

But, if the word "heirs" is given a broader construction and held to mean any one who might under any circumstances be or become an heir of the member, it would greatly enlarge his power to dispose of the fund and enable him to assign it to persons not within the contemplation of the statute, as beneficiaries. Without deciding whether the word "heirs," as it applies only to personal estate, may not be held to mean distributees, we are of opinion that it is used in the by-laws, in its limited sense, to designate such persons as would be the legal heirs or distributees of the member at the time of application or designation. This view is sustained by the fact that in the fourth clause of the same section the same words are used in this sense, it being provided that "if the designator leave no widow or children or assignee, then it shall be payable to his heirs."

In the case at bar, Davis L. Wetmore, in his application for membership, designated his wife, Addie E. Wetmore, as the person to whom the benefit was to be paid upon his death. At a later day he attempted to change the designation from his wife to his mother, Abigail C. Wetmore. It is agreed that his mother was not living with him, but with her husband in another town and county. It is not suggested that she was dependent upon him. She was not of those who would be his heirs and she was not one of the members of the decedent's family within the meaning of the by-law. To give the word "family" the broad construction claimed by the defendant would make the by-law overreach the scope of the statute and violate its spirit and purpose.

It follows that the attempted designation to the mother of the deceased member was illegal and invalid, and we need not discuss the question whether it was sufficiently assented to by the directors of the defendant corporation.

As the assignment to the mother was invalid, we think the original designation to the wife remained in force. We can see no reason to suppose that the later assignment was intended to operate as a revocation of the designation to the wife, unless it took effect as a designation to the mother.

The scheme of the by-law is that the beneficiary shall be designated by the member in his application for membership, and the benefit shall be paid to such beneficiary, unless there is a subsequent legal assignment; they make no provision for revoking a designation, except by a legal assignment to some other person, assented to by the directors.

We cannot presume that the deceased member intended his assignment to operate as a revocation of the previous designation, in the event of its invalidity, as an assignment to his mother, and there is no assent of the directors to any such revocation.

We are, therefore, of opinion that the plaintiff, Addie E. Wetmore, is entitled to a decree that the fund in question shall be paid to her. The plaintiff Elsey has no interest in the fund, and cannot maintain this bill. As to him the bill must be dismissed.

Decree accordingly.

THE INSURANCE LAW JOURNAL.

VOL. XV.

NOVEMBER, 1886.

NO. 11

REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES
SUPREME AND CIRCUIT COURTS, AND IN THE
STATE SUPREME COURTS.

From certified transcripts in our possession.

SUPREME COURT OF CONNECTICUT.

DISTRICT OF HARTFORD.

MAY TERM, 1886.

WILLIAM W. HOLMAN

vs.

CONTINENTAL LIFE INSURANCE COMPANY. }

The policy provided that by the failure to pay any notes given for premiums, all liability for the sum insured should cease "except as hereinafter provided;" also, that in case of default in paying any premium when due the company would convert the policy into a paid-up policy for as many tenths as there have been complete annual premiums paid. Default was made and an indorsement was made on this policy that it was binding for a commuted amount subject to its terms. The policy further provided

VOL. XV.—51.

that upon failure to pay interest when due on premium notes, the policy should cease and the company should not be liable for the payment of the sum insured, or any part thereof.

Held, That failure to pay the interest when due worked an entire forfeiture.

H. B. FREEMAN, *for the Plaintiff*.

T. M. MALTBY, *for the Defendant*.

LOOMIS J.

The complaint seeks to recover the amount due under a so-called "paid-up policy of insurance on the life of William W. Holman for the benefit of his wife. The demurrer to the defendant's answer raises the question whether the defense therein set forth is sufficient in law to prevent a recovery by the plaintiff, and this depends entirely upon the contract of the parties. By the terms of the contract as originally made, the defendant was to receive an annual premium of one hundred and eight and $\frac{2}{3}$ dollars during the continuance of the policy for the term of ten years, payable, as appears from the margin, partly in cash and partly by note. At the end of twelve years, or upon the previous death of the insured, the defendant was to pay one thousand dollars, deducting therefrom all indebtedness to the said company on account of this policy, if any, then existing," subject to sundry express conditions and agreements mentioned in said policy, the third and fourth of which only are involved in this case. "Third. If the said assured shall not pay the said annual premiums on or before noon of the several days hereinbefore mentioned for the payment of the same, and the interest annually in advance on any outstanding premium notes which may be given for any portion thereof, or shall not pay, at maturity, any notes or obligations given for the cash portion of any premium or part thereof—then, and in every such case, this policy shall cease and determine, and said company shall not be liable for the payment of the sum insured or any part thereof, except as hereinafter provided."

"Fourth. That if, after the receipt by the company of two or more annual premiums upon this policy, default shall be made in the payment of any subsequent premium when due, then, notwithstanding such default, this company will convert this policy into a "paid-up" policy for as many tenth parts of the sum originally insured as there shall have been complete annual premiums paid when such default shall be made; provided that this policy shall be transmitted to and received by this company, and application made for such conversion within one year after such default."

The defendant's answer, after admitting the issuing of the policy, its terms, and demand, and refusal to pay, etc., as alleged in the complaint, further alleged that—

"2. On the first day of April, 1874, the plaintiff had paid to the defendant in cash a portion of two annual premiums, and had given to the defendant premium notes for the remaining portion of said premiums, which notes were then and are now outstanding and unpaid. 3. Thereafter the plaintiff made default in the payment of premiums, and transmitted said policy to the defendant, and with his wife, Rebecca J. Holman, applied to the defendant to adjust the insurance under said policy, according to the stipulations thereof, by reducing the amount thereof to \$200; and in said application agreed to pay the defendant annually in advance the interest on all outstanding notes given in part payment of annual premiums. 4. Thereupon the defendant made the following indorsement upon said policy of insurance: "This policy having lapsed after two annual payments, is hereby recognized as binding upon the company for two-tenths thereof, or \$200, subject to the terms and conditions expressed in this policy and in the quit-claim to this company, bearing even date with this entry," and returned said policy to the plaintiff, who accepted the same.

"5. Thereafter the plaintiff paid the interest on said outstanding premium notes annually in advance until the year 1876, when he ceased to pay the same, and has not since paid the same.

"6. Said policy provided that if the assured should not pay the interest annually, in advance, on any outstanding premium notes given for any portion of the annual premiums on said policy, then said policy should cease and determine, and said company should not be liable for the payment of the sum insured, or any part thereof.

"7. By reason of the failure and neglect of the plaintiff to pay the interest annually, in advance, on said outstanding premium notes in the year 1876, and thereafter, said policy of insurance has ceased and determined, and the defendant is not liable for the payment of the sum insured, or any part thereof."

The plaintiff's reply was as follows: "The plaintiff demurs to the answer of the defendant, as the facts therein stated are insufficient in the law, because the 'paid-up' policy upon which complaint is brought was non-forfeiting by its terms, and contained no provision that the failure to pay interest on the outstanding premium notes should work a forfeiture of said paid-up policy and the same is nowhere in said answer."

The special ground of this demurrer presents the precise question involved in the case, viz.: Does the "paid-up" policy contain a provision that the failure to pay interest on the outstanding premium notes shall work a forfeiture of the policy?

This question is different from the one considerably discussed in other jurisdictions, viz.: What will entitle the insured to a paid-up policy, and what provisions as to forfeiture should it contain? The parties have settled these questions themselves by giving and accepting the reduced insurance, and if the policy thus accepted contains a provision whereby the failure to pay interest will make it void, then the plaintiff by his pleadings impliedly admits that he has no case, even though he would have been entitled to a different policy under the original contract.

The new contract, whereby the insurance was reduced to two hundred dollars, states that the company recognize the policy binding for that sum, "subject to the terms and conditions expressed in this policy, and in the quit-claim to this company bearing even date with this entry." This in effect, is the same thing as a new policy containing the terms and conditions of the old one as far as applicable. Now, among the conditions is the clear stipulation that "if the assured shall not pay * * * the interest annually in advance on any outstanding premium notes * * * this policy shall cease and determine," etc. In what manner did this provision become eliminated from the paid-up policy?

It cannot be claimed to be inapplicable, because there is a subsisting obligation to pay this interest annually in advance recognized not only in the original policy, but in the quit-claim whereby the plaintiff and his wife when they applied for the reduced insurance made a fresh promise and agreement to pay this interest, and this quit-claim is referred to and made part of the new contract, and the promise on the part of the company is made subject to it as a condition.

But a specious argument always urged against this view by counsel for the insured, and sometimes sanctioned by courts, is founded upon what is called the absurd paradox of forfeiting a non-forfeitable policy. The name, non-forfeiting, has undoubtedly been sometimes used to mislead applicants for insurance, and some of the cases refer to the fact that agents for insurance companies have made declarations, and issued circulars, to the effect that after the payment of two annual premiums the policy would be binding on the company without any farther attention on the part of the holder.

But no such fact appears in this case and upon the admitted facts it is certain that the insured was not misled, for he voluntarily offered to pay and did actually pay interest annually in advance on the paid-up policy until the year 1876. It is manifest that both parties at the time, and for several years subsequently, construed the contract alike. There was no trap therefore into which the plaintiff was unwarily led.

But courts need not be misled by mere appeals to prejudice. The contract is not to be construed by its mere label, but by its written terms, and upon referring to these we see at once that the policy is non-forfeitable only to a very limited extent. No one has ever claimed that it extends beyond the payment of an annual premium and interest, and even in these respects it is non-forfeitable only at the option of the holder who must transmit the policy to the company, and make application for its conversion into a paid-up policy within one year after default. But a glance at the policy will show that even after the conversion the insured can have no security against forfeiture except by observing the conditions. If, without the consent of the company, he travels outside of the prescribed limits mentioned, if he engages in certain specified hazardous occupations, if he becomes intemperate or addicted to vice of any kind to the extent of permanent impairment of his health, if he is convicted of felony, if he dies by his own voluntary act, or in consequence of a duel or under the sentence of the law, the paid-up, non-forfeitable policy could not for a moment avail, but would thereby become null and void.

Any argument therefore founded merely upon the use of the term "non-forfeitable" is of little weight. We must, as in all other cases, construe the contract by the language used in it. In this case the question is confined to the language of the saving clause, which is the fourth. Does that save the insured from the consequences of a failure to pay interest the same as it does in the case of failure to pay future annual premiums? The third clause, which it is indispensable to consider in this connection, clearly specifies two distinct defaults, either of which will forfeit the policy: first, failure to pay the annual premiums when due; and second, failure to pay interest in advance on outstanding premium notes. So far, the meaning cannot be mistaken. Now, how does the saving clause which follows affect the question? It only relieves the insured (after the payment of two or more annual premiums) from one of those defaults, "the payment of any subsequent premium when due." Not

a word is said about interest. The saving clause there is not co-extensive in its operation with the preceding forfeiture clause, as it should be to justify the plaintiff's construction. It is not easy to conceive why the parties having clearly in mind the distinction between the two causes of forfeiture mentioned in the third clause, should in the next, in terms, confine the relief to one only if they intended to place both on the same ground. To accept the plaintiff's view would be for the court, virtually, to insert what the parties omitted. If it be suggested that the distinction between interest and premium notes was unnecessary, the answer is twofold. In the first place the parties have made such a distinction and presumably had it in mind all through, and in the second place the distinction is well founded, for the interest contract is not a mere incident of the note, but distinct from it; it is payable in advance at the beginning of each year without reference to the time when the notes became due, and herein is a distinction of some importance between the case at bar and some of the cases from other jurisdictions where the premium note was payable at a future day with interest without separate contract as to the latter. In such case the interest being a mere incident of the note could not be separately recovered, and there would be some reason for holding that if the note was to be paid only by deducting it from the policy upon its final adjustment the interest also must follow the same course, for it must follow the note.

But is the distinction which we have assumed the policy in question makes, reasonable and just? The requirement to pay interest annually is indispensable to the success of this system of insurance, where credit is given. The annual premium for the risk here was \$108⁷²/₁₀₀. The policy was a participating one under which the insured was to receive his fair proportion of dividends. The company could not treat this matter as entirely isolated from all other policies. Some stable basis must be found upon which an intelligent estimate could be made of the company's ability to pay losses, expenses, and dividends. Such basis can only be founded in the assumption that the company will certainly receive the annual premium in money or a fair equivalent in the way of annual interest. The reception of the note payable at a future day cannot possibly be the same thing as payment in money, unless interest is paid on the credit annually. The relief from forfeiture provided for in the policy is based upon the equitable idea that the reduced policy represents the proportionate amount of insurance fully paid for upon a

cash basis. If the insured wishes to be secure from forfeiture he may pay the annual premiums in money. If he insists on a credit he may take a reduced policy which exempts him from the payment of future annual premiums, but he is still subject to the rigorous condition to pay interest or lose the benefit of his policy.

In support of these views we cite sundry cases from other jurisdictions.

The case of *Knickerbocker Life Insurance Co. vs. Dietz* (52 Md., 16, decided in April, 1879) is very strong for the defendant. The original policy, in substance, was the same in every respect as the one under consideration. It was dated May 5, 1873, and under it the insured paid premiums in cash and notes up to May 5th, 1873, when he surrendered the policy and obtained a new one for five-tenths of the amount originally insured. The second policy stated that it was issued in consideration of the surrender of the previous one and accepted by the insured upon the express condition and agreement that if the interest should not be paid on or before the day named the policy should be null and void. The interest was not paid on the 5th of May, 1874, and the policy was canceled by the company. Soon after this the insured tendered the interest due, but the company refused to receive it.

The questions arose under a bill in equity alleging that no interest was required to be paid May 5th, that the clause that made the new policy void on non-payment of interest was inconsistent with the true meaning of the contract; that the stipulation as to forfeiture was in the nature of a penalty, against which a court of equity should relieve, and praying for such construction of the contract and for a decree for the payment of the amount of the policy, less the notes and interest. It will be seen that the position of the case before a court of equity was more favorable for the claimant than in the present case, but the court held there was no relief. Grason J., in delivering the opinion of the court said: "The theory on which the amount of the premium is fixed * * * is that assuming that a man of a given age has a prospect of living a certain number of years, as shown by experience and observation, the premium charged is such a sum as, invested annually at a certain rate of interest and compounded, will, at the expiration of that time, amount to enough to pay the policy and cover the expense of the company. To accomplish this result the premium must be punctually paid and invested, and the interest re-invested at the assumed rate. Otherwise the ability of the company to pay the policy, instead of being

a matter of reasonable certainty, becomes a mere matter of chance, the business of life insurance ceases to have any scientific or accurate basis, and a policy of insurance becomes a mere wager on the life of its holder. The prompt payment of interest on premium notes is as necessary to the successful working of an insurance company, as well as to the security of the insured, as are the payment of the premium notes themselves. If one policy holder can fail to pay his interest, any number of them may do the same, and the ruin of the company would be the inevitable result. The time for the payment of interest on premium notes is of the essence of contracts of insurance."

The case of *Knickerbocker Insurance Co. vs. Harlan* (56 Miss., 512; decided in January, 1879) was an action on a paid-up policy which recited that it was issued in consideration of the surrender of the original policy (the provisions of which were similar to that in the case at bar) and which stipulated that if the interest on the premium note was not paid before a specified day the policy should be null and void, etc.

The company pleaded the forfeiture of the paid-up policy by reason of the non-payment of interest. To which plea the plaintiff demurred, precisely as in the case at bar. The court below sustained the demurrer upon precisely the same arguments as are urged in behalf of the plaintiff in the present case; but the judgment was reversed in the supreme court mainly upon the ground that under a proper construction of the new policy the right to recover the sum assured by it was to be earned only by the prompt payment in future of the interest on the premium note, and that it made no difference that the amount of the note was already due the company on the old policy.

In *Alabama Gold Life Insurance Co. vs. Thomas* (74 Ala., 578, decided in December, 1883) the action was upon a paid-up policy as contained in an indorsement upon the original policy, the terms of which were as follows: "In consideration of the payment on the within policy of four annual premiums, less note for \$169.20, given for balance due on premium loans to November 11, 1872, said policy is entitled at maturity to a paid-up value of four tenths of the sum insured, subject to deduction of note above described, interest upon which is payable annually in advance." It was held that the indorsement was to be construed together with the original policy as constituting one contract, and that thereby the parties made a clear agreement that the policy should be void in the event of the failure

to pay interest. It was held as in the Maryland case before cited, that "the payment of interest was of the essence of the contract; that the calculations of insurance actuaries fixing the rates of insurance are based on the theory of prompt payment, so as to afford opportunity for such re-investment as to reap the fruits of compound interest upon the company's moneyed capital." Insurance Co. vs. Robinson (40 Ohio St., 270) was an action based on the refusal of the company to grant an application for a paid-up policy pursuant to the provisions of a policy containing provisions identical with the one at bar, so that this case presents the question as to the rights of the parties under a non-forfeiting policy like the one in this case prior to the indorsement made upon it. The default on the part of the insured was simply as to interest on the premium notes. He had paid previously four annual premiums, part in cash and part by note in the manner provided. Granger, C. J., in delivering the opinion of the court said: "The 'third' condition before us is plain. It clearly states that upon a failure to pay the interest in advance the policy should be void. The 'fifth' adds that in such case all payments thereon and all dividends and credits accruing therefrom shall be forfeited to the company.' But the insured claims that the 'fourth' condition modifies the 'third.' This fourth condition makes no reference to interest, either expressly or by reasonable implication. Having failed to pay the interest due on four notes, he in effect was in default for a part of each of four annual premiums, besides the one that became due on March 7, 1875. This interest formed no part of the annual premium due on that day. Its punctual payment was necessary to complete the payment of the premiums due in the four preceding years." * * * "We are unwilling to so construe a stipulation worded so plainly, and with such evident care as to make of no moment a default which the third condition declared of enough importance to destroy the life of the policy."

In *Attorney-General vs. North America Life Ins. Co.* (82 N. Y., 172, decided in September, 1880) the question arose in reviewing the decision of a referee appointed to adjust the claims against an insolvent life insurance company in the hands of a receiver. It appeared that in lieu of certain policies upon which notes had been given for part payment of annual premiums, paid-up policies had been issued containing a provision that in case the interest should not be paid as agreed, the policies should become void. Where there was such default in the payment of interest the referee rejected the claims and the court of appeals unanimously sustained

the ruling. Earl, J., in delivering the opinion, in answer to the claim that the condition relied upon by the insurance company was unconscionable, and that a case of forfeiture was presented against which a court of equity should relieve, said, among other things :

"It was a contract between the parties that these policies should be carried only so long as interest should be promptly paid upon the notes; and if not paid, that the company should cease to be liable.

* * * The provision is not an unusual one. * * * Here was an insurance company doing business throughout the country. Prompt payment of its obligations was deemed important to it. If premiums to such an insurance company are not promptly paid, it may be agreed that the policy may be forfeited. If notes be taken for premiums, payable at a definite time, the policy may be avoided for non-payment. If notes be taken which are to run to maturity of the policy and then be adjusted, the policy may be avoided for non-payment of the interest. All these cases stand upon the same footing, and a court of equity can, upon principle, no more relieve against a forfeiture in one of them than in either of the others.

The case of the claimants may be treated as if the interest represented premiums to be paid during the running of the policies.

* * * There is much authority sustaining the decision of the referee : *Anderson vs. St. Louis Mut. L. Ins. Co.*, 5 Bigelow, 527; *Martin vs. Aetna Life Ins. Co.*, id., 514; *Patch vs. Phoenix Mut. Life Ins. Co.*, 44 Vt., 481; *Knickerbocker Life Ins. Co. vs. Harlan*, 8 Ins. L. J., 349; *Nettleton vs. St. Louis Life Ins. Co.*, 6 id., 426; *Smith vs. St. Louis Mut. Life Ins. Co.*, 2 Tenn., Ch., 742." *Patch and Wife vs. Phoenix Mut. Life Ins. Co.* (44 Vt., 481, decided in 1872) was an action of assumpsit upon a paid-up policy issued in exchange for an endowment policy upon which two annual premiums had been paid partly by two notes. The exchange was made pursuant to a memorandum on the back of the first policy to the effect that the company would purchase any of its policies upon which two annual premiums had been paid and issue a new policy for the equitable value of the policy surrendered, "thus making all policies non-forfeitable." On the margin of the paid-up policy was the statement : "This policy is conditional on the interest on two notes given in part payment for two premiums paid on No. 10,603, being paid in advance." Pierpont, C. J., in delivering the opinion, among other things, said : "The interest upon the notes by their terms, is to be paid annually, and it is such interest that the memorandum refers to and requires to be paid in advance. Any other construction

would be a manifest violation of the meaning and intent of the parties to this contract. The defendants having taken the notes in the place of the money, it could not reasonably be expected that the defendants would do less than to secure the payment of the interest thereon by making the new policy dependent upon its payment. Treating the memorandum as a part of the policy, and the whole to be considered the same as though it was included in the body of the instrument, the interest upon the notes "becomes practically a premium upon the policy, payable annually in advance, and on failure to pay the same, the company ceases to be liable, and the policy is forfeited." *Russum vs. St. Louis Mut. Life Ins. Co.* (1 Mo. App., 228, decided February 28, 1876), was an action on the original policy conditioned, 1, that default in the payment of future annual premiums should not avoid, but it should be proportionately reduced; 2, that if the insured should fail to pay annually in advance the interest on premium notes the policy should be void. Gantt, P. J., in delivering the opinion of the court, said: "If the insured had paid the interest on his note on December 2, 1871, he would, we think, have been entitled to recover two-tenths of the sum insured, deducting the unpaid note. Having failed to make that payment the policy is forfeited and the company discharged. We think it impossible to escape this conclusion. * * * It is urged that the two provisions of this policy are inconsistent and contradictory, and that the one which leads to a forfeiture must be rejected; but the clauses are not inconsistent. * * All that is needed is for the insured to bring himself within the terms of both. The first is intended to save a forfeiture which generally would be incurred by the failure to pay the annual premium. To this extent it is a privilege or advantage to the assured. The second proviso insists upon rigorous conditions; in respect of what? Only of so much of any unpaid premium as the assured, instead of paying in cash, takes the indulgence of only paying interest on at 6 per cent. If he does not wish to incur the hazard of a forfeiture on account of this part of the premium, his remedy is easy; he can presently pay his note for the premium and, without more, he has a paid-up, non-forfeitable policy for a fixed portion of the sum contemplated by the instrument when originally issued. If he wishes instead of this to take the chances of gain, he must at the same time incur the hazard of loss, and cannot complain if he be held to the terms of the contract he has deliberately made.

Other pertinent cases might be cited, but these will suffice to

show that the views of the majority of this court have a very strong support in other jurisdictions, and while we concede that the opposing views of the plaintiff are sustained by some courts entitled to very great respect, we think the weight of judicial authority is the other way.

The first case cited in behalf of the plaintiff, to which we will refer, is *Fithian vs. North Western Life Ins. Co.* 4 Mo. App., 386, decided October 23, 1877, by the same court that decided *Russum vs. Ins. Co.*, supra., the year previous. It was held that non-payment of interest did not forfeit the policy in that case, and some of the reasoning at first blush seems different from that in the first case; but Lewis, J., who delivered the opinion, concurred in the previous one, and no allusion whatever is made to the other case—it would seem improbable that it was the intention of the court to overrule the case, or that it was considered inconsistent with the last one; and upon examination of the policy, we see good ground for a distinction. The first stipulation was that, in case of default, the company would pay as many tenths of the original sum as there should have been complete annual premiums paid. Then followed the provision: "If said premiums or the interest upon any note given for premiums, shall not be paid on, etc., * * * then, in every such case, the company shall not be liable for the payment of the whole sum assured and for such part only as is expressly stipulated above." Here both notes and interest are put on the same ground, showing that no distinction was intended, and the company in terms is made liable as stipulated; that is, for so many tenths of the original sum insured; and there were other provisions in the policy adverted to in the opinion, showing that no forfeiture was to arise because of any default in payments, whether of notes or interest. This case, it will be seen, may therefore be widely distinguished from the one at bar, in that the policy in terms secures a proportionate part against forfeiture, while here, as we have seen, it is expressly forfeited for non-payment of interest, with no relief provided.

The same distinction may also be made in regard to the cases of *Hull, Admr., vs. Northwestern Life Ins. Co.*, 39 Wis., 406; *Northwestern Mut. Life Ins. Co. vs. Little*, 56 Ind., 504; *Ohde vs. Northwestern Life Ins. Co.*, 40 Iowa, 357; *Symonds vs. Same*, 23 Minn., 491; *Northwestern Mut. Life Ins. Co. vs. Ross, Admr.*, 63 Ga., 199; and *Same vs. Bonner*, 36 Ohio St., 51. In all these cases the policies were the same as in the case cited from 4 Mo. App., supra.

Of all the cases therefore cited in behalf of the plaintiff, only two remain which are weighty in the opposing scale. The first and the stronger case is that of Cowles against the present defendant, decided July 31, 1885, by the Supreme Court of New Hampshire, reported in *New England Reporter* (vol. 1., No. 10, p. 247, where the action was assumpsit on a paid-up policy, identical in its provisions with the one now in suit, and where the defence was the same. It is therefore irreconcilably in conflict with the positions we have taken.

In the brief but forcible opinion delivered by Doe, Ch. J., there is no reference to the authorities. The basis upon which the reasoning rests will fully appear from the following quotation: "A significant clause of the contract is a conspicuous marginal advertisement, describing the writing as a 'non-forfeitable endowment policy.' The forfeiture clause qualified by the provision for a paid-up policy, does not mean that the reduced paid-up, non-forfeiture insurance is annually forfeitable for non-payment. The strict construction for which the defendant contends would leave the insured exposed to a danger from which the reduction and conversion of the policy would be generally understood to relieve him; and it is not to be presumed that the document was ingeniously drawn up for the purpose of fraudulently obtaining money by non-forfeiture pretenses. All parts of the contract taken together can be, and should be, reasonably and liberally understood, as designed to accomplish the scheme of non-forfeiture for non-payment, which men in general would believe the policy invited them to accept."

The other case is Bruce against the present defendant, decided February 26, 1886, by the Supreme Court of Vermont, and reported in the *Eastern Reporter*, vol. 4, No. 6, p. 452. This was a bill in chancery to compel the delivery of a paid-up policy and payment of the amount due. The court gave the same construction to the original policy as was given in the New Hampshire case, but certain circulars issued by the company, and the fact found in the case, that the company regarded the premium notes as given for a loan of money, seem to have been influential with the court.

This case, however, recognizes a distinction already adverted to, and which we think applicable to the case now under consideration. Powers, J., in giving the opinion, said: "The case at bar is unlike *Patch vs. Ins. Co.*, 44 Vt., 481. There the question arose upon the construction of a paid-up policy, issued in place of a former one surrendered, which contained an express stipulation that certain

sums of interest should be paid in advance. The action was assumpsit on the paid-up policy, and no question was made whether the paid-up policy was in such form as the insured was entitled to. Such as it was, he accepted it, and the action was upon it in the form it was issued and accepted.

It is manifest that our argument, in some particulars, has gone beyond the strict requirements of the present case, and has tended in some measure to show that the form of paid-up policy issued to the plaintiff, and accepted by him, was in accordance with the original policy; but in view of the adverse construction of the same kind of policy by the courts of New Hampshire and Vermont, and the want of unanimity among the members of this court upon this subject, we think it best to leave that part of the discussion an open question for future consideration should the matter again arise, and to restrict the present decision to the precise question as stated, at the opening of our discussion, that the paid-up policy involved in this suit does contain a provision whereby the failure to pay interest has accomplished the forfeiture of the policy.

We advise that the answer of the defendant to the complaint is sufficient.

SUPREME COURT OF NORTH CAROLINA.

B. F. ELLIOTT, ADM'R, ET AL.,

vs.

R. H. WHEDBEE, ET AL.*

The intestate died owning a benefit certificate in a mutual insurance corporation, made payable to his personal representative. The by-laws permitted assignment, prescribing the formalities. In a contest for the proceeds of the policy between the representative and some of the heirs, *Held*, That parol evidence of an assignment was inadmissible, and that the formalities of the assignment must be strictly followed, the same being intended for the protection of the association.

A clause in the charter of a mutual insurance company, that the purpose is in part for the "relief of widows and orphans by voluntary contributions," does not mean that the benefit necessarily inures to the widow and orphans. The representative is entitled to recover, in the absence of a valid assignment under the by-laws, for the purposes of administration.

This was a civil action tried before Shipp, judge, at spring term, 1885, of Chowan Superior Court, upon the following case agreed, to wit:—

John W. Nowell died intestate in Chowan County in 1883, leaving him surviving Cornelia C. Nowell, his widow, and the plaintiff, J. W. Nowell, Jr., and the three feme defendants, Julia, wife of R. H. Whedbee, Ada Nowell, and Sallie, wife of W. H. Elliott, none of whom had any estate, and all are now of full age except the plaintiff, J. W. Nowell, Jr., who was born since the death of his father. Letters of administration on his estate were granted to the plaintiff, B. F. Elliott.

Before his death the intestate procured a certificate of member-

* Opinion filed, February, 1886.—From *South Atlantic Reporter*.

ship in the Christian Brotherhood of Norfolk, Virginia, an insurance organization, of which the following is a copy :—

No. 956.

CLASS 1.

THE CHRISTIAN BROTHERHOOD.

Benefit Certificate.

Know all men by these presents, that John W. Nowell is this day admitted a member of the Christian Brotherhood, entitled to all the benefits of class No. one, and no other, as the same may appear. In case of the death of the said John W. Nowell, being at the time of his decease a member hereof in good standing and repute, and not in arrears to said brotherhood in annual dues, assessments, or otherwise, the said brotherhood hereby agrees to pay to the personal representative or representatives of said John W. Nowell, or to the person or persons herein designated by the said John W. Nowell to receive the same, as the case may be, a sum of money aggregating in all not more than the sum of one thousand dollars. * * * *

(Signed)

JOHN W. NOWELL.

RICHARD H. JONES.

General Secretary.

Countersigned by
J. H. GARRETT, *Agent.*

On the back of this policy was a printed form for the designation of the beneficiaries, which was as follows :—

I desire and direct you to pay all sums of money due and owing my estate, at the time of my death, by reason and virtue of this certificate to —————, of the State of —————.

Witness :

Signature of Holder.

The blank after the word "to" was filled in, in the handwriting of the intestate, with "my three daughters, Sallie, Julia, and Ada;" but it was not signed by the intestate, nor was there any witness to the same. At the time of the application to the agent of the said brotherhood for the certificate, the intestate said to him that he desired to procure the same for his said three daughters, and at the time of making the above indorsement, he called it to the attention of his daughter, Ada Nowell, and gave his reasons why he intended it for his three daughters. At the death of Nowell the said certificate was found among his papers and effects, and in the condition exhibited. The defendants, other than Elliott and wife, took possession of the same, and demanded payment thereof of the company.

The officers of the company said they thought the designation sufficient, but declined to pay because of the adverse claim set up by the plaintiff Elliott, administrator, etc. By consent of the parties plaintiff and defendant, the money due by the brotherhood, on said certificate, was collected by the defendants, and deposited in bank, to await the determination of this action.

In a few weeks after the death of Nowell, the plaintiff, John W. Nowell, Jr., was born. John W. Nowell, Sr., took out the policy in February, 1882, died in February, 1883, and his son John was a child of his second marriage.

One of the by-laws of the corporation was that "members of the society may issue their certificates to whomsoever they may choose, or they may designate the person or persons to whom payment shall be made after death."

The plaintiffs claim that the money belongs to Elliott, the administrator of Nowell, to be distributed under the statute. Whedbee and wife and Ada claim that it belongs exclusively to Sallie, Julia, and Ada.

The estate of Nowell is solvent, and this fund is not necessary to pay debts.

If the opinion of the court shall be in favor of the plaintiffs, judgment shall be rendered in favor of B. F. Elliott, administrator, for \$609.85, and interest from 1884; otherwise for the defendants.

The court rendered judgment in favor of the defendants, and the plaintiffs appealed.

W. D. PRUDEN, of PRUDEN & VANN, for *Plaintiffs*.

L. L. SMITH, for *Defendants*.

ASHE, J. (after stating the facts).

The Christian Brotherhood was a corporation, chartered by the General Assembly of Virginia, upon the mutual insurance principle. It was made by the charter capable in law and equity to sue and be sued, to plead and be impleaded, contract and be contracted with, and use a common seal, etc. In the second paragraph of the charter it was declared: "The objects of this brotherhood are entirely benevolent, and shall be established in the city of Norfolk, State of Virginia, for the purpose of encouraging a high standard of morality, lightening the burdens of the poor, abating privation and suffering, promoting industry, economy and needed reform, and providing relief for widow and orphans by voluntary contributions." By the fifth paragraph it was authorized to adopt such by-laws as may be necessary for the government of the brotherhood.

The only by-law bearing on the question before us, and the only one referred to by the counsel for the defendant, is as follows:—

Members of this society may issue their certificates of membership to whomsoever they may choose, or they may designate the person or persons to whom payment shall be made after death.

The next question presented by the record for our consideration is whether the defendants, the three daughters of the insured, John W. Nowell, are entitled to hold the whole of the fund paid on his policy, or whether the plaintiffs, the widow and posthumous son of the insured, are not entitled to share equally with the defendants in the fund, and if so, whether the administrator may not recover the same for their use.

The plaintiffs insist that under the by-laws above cited, the representative of J. W. Nowell, that is, his administrator, is designated in the policy as the person who is to take the amount due upon the death of Nowell, and the defendants contend, that notwithstanding the policy was made payable to the representative of the insured, the insured had the right under the charter and by-law to designate the person or persons to whom the policy should be paid, which he had done, by filling in the names of his three daughters in the blank form found on the back of the policy.

We will first consider the question, whether by the designation on the back of the policy, or other matter connected with the transaction, the right to the policy was transferred to the defendants.

There is no provision in the charter, nor any by-law that has been brought to our notice, that the policy issued by the brotherhood must be taken in the name or for the benefit of the widow, children or family of the insured. The contract evidenced by the policy, is to pay the personal representative of the insured. That is the agreement. It is in writing and under the seal of the corporation, and the evidence offered by the defendants to show that the insured intended the policy for the defendants, was insufficient for the purpose for which it was offered. For parol evidence is not admissible to vary, explain, or contradict an agreement in writing: *Donaldson vs. Benton*, 4 Dev. & Bat., 435; *Etheridge vs. Palin*, 72 N. C., 213; *Wilson vs. Sandifer*, 76 N. C., 347.

But it is contended that if the parol evidence tending to show the intention of the insured is not sufficient, the policy and all interest in it was transferred to the defendants by the designation indorsed on the back of the instrument.

But we are of the opinion that it did not have that effect, for several reasons. First, because it was incomplete. The by-law permitted the assignment and designation of the person to whom it was to be paid, but the company prescribed the mode by which it should be done, by placing the blank form in print upon the back of the policy, with the place designated for the signature of the holder

and for the names of the witnesses, which shows that it required the assignment as well as designation, to be signed by the holder and attested by a subscribing witness. In this case, it was neither signed by the holder nor attested by a witness. The holder of the policy, when he filled up the blank in the form for designation with the names of his three daughters, could not help seeing below the printed form, the words: "Signature of holder," and "witness." This omission to sign, under the circumstances, leads to the conclusion that it was done with a purpose, and that he had some reason for not completing, at that time, the designation, by signing his name and having it witnessed. The designation bears no date. It may have been that he was then contemplating his second marriage, or if married, that he was expecting the birth of the child, with which his wife was enceinte at the time of his death, and he forebore to complete the designation in the mode prescribed by the company, reserving to himself the right to modify it, according to circumstances that might arise. But whatever may have been his motive, he left it incomplete, and the mere attempt to make the designation, which was not consummated, could have no effect upon the original contract.

The form for the designation of the person to whom the holder might direct the policy to be paid, was evidently prescribed by the company for its own protection; that upon the death of the holder there might be no question as to the person to whom it was to be paid, and not leave it to the uncertainty of parol evidence. Therefore, the form of designation was prescribed, and it required that it should be signed by the holder, and attested by a witness or witnesses. But in this case, it was not complied with, and the designation having been thus put out of the way, the question arose, can the action be maintained by the administrator of John W. Nowell, deceased? We can see no reason why it cannot. The express terms of the contract, as manifested by the certificate, is that the amount due upon the policy, on the death of the holder, shall be paid to his representative or representatives, and there is nothing in the charter or by-laws that makes it payable even by implication to any one else; for by the by-law above cited, the holder may assign the policy to whomsoever he may choose.

There is no provision in the charter or by-laws indicating, as in many other corporations of like kind, some of which have been referred to in the argument of the defendants' counsel, that the policies issued by the company shall inure to the benefit of the

"widow, children, or family" of the insured. The only reference in the charter to "widows and children," is the declaration that one of the objects of the incorporation is for the relief of "widows and orphans" by voluntary contributions.

Contributions by whom? It is susceptible of no other construction, than that it means contributions made by the association for the relief of "widows and orphans," "by lightening the burdens of such as are poor, and abating their privation and suffering."

Our opinion is, the administrator had the right to maintain the action, but as it is agreed that the fund in controversy is not needed for the payment of the debts of the intestate, and when received must go in distribution among the next of kin, who are the defendants and the plaintiffs other than the administrator, and inasmuch as the fund is in the possession of the defendants, the administrator should have judgment only for two-fifths thereof, the shares going to the two plaintiffs or next of kin of the deceased, and the defendants shall be allowed to retain their shares, to wit, three-fifths of the fund, for, as was said in *Baker vs. Railroad* (91 N. C., 308), "there is no reason why it should be required to be paid, when it must be returned;" and see *Rogers vs. Chestnut*, 92 N. C., 81.

Our opinion is, there was error in the judgment of the superior court, and the plaintiff Nowell, as administrator, is entitled to judgment as indicated in this opinion. Let this be certified to the superior court of Chowan, that the case may be disposed of in conformity to this opinion.

Error. Reversed.

SUPREME COURT OF VERMONT.

WASHINGTON COUNTY, MAY TERM, 1885.

JOHN CURRIER

vs.

CONTINENTAL LIFE INS. CO.*)

Where no fact is shown as to the wife, as that she was insane, or an invalid, the presumption is that the husband has an insurable interest in her life. The question being whether the plaintiff had paid a premium, and the defendant having issued a receipt for the same by order of a court of equity in New Hampshire; *Held*, that the receipt was sufficient proof of payment, and therefore, that it was immaterial whether the record of the proceedings in said court was properly authenticated or not.

A policy, indorsed with the words "with profits," is sufficient proof that the plaintiff is entitled to profits, and the admission of other evidence to show the same fact, if error, was harmless.

The company is entitled to deduct an unpaid premium note from the amount of the policy.

Assumpsit to recover upon a contract of life insurance, issued by the defendant upon the life of Sarah M. Currier for the benefit of the plaintiff. Plea, the general issue, tender, and offset. Trial by jury, September term, 1883, Redfield, J., presiding. Verdict ordered for the plaintiff.

The policy was dated November 14, 1865. Sarah M. was the wife of the plaintiff, and her death occurred February 5, 1882.

It was conceded by the defendant, that the first four premiums of \$572.70 each, payable by the terms of the policy on the 14th day of November, in the years 1865, 1866, 1867, and 1868, were seasonably paid by the said John Currier by his notes of those dates, each for

* From 67 Vermont Report.

the sum of \$286.35, payable to said defendant or order, and by his paying the balance of said several premiums in cash. To show the payment of fifth premium, payable November 14, 1869, the plaintiff offered in evidence a document purporting to be a copy of record of the Supreme Judicial Court in and for the county of Grafton, in the State of New Hampshire, in a suit in equity in favor of said plaintiff against said defendant, brought in 1871, in which said Currier claimed that he had paid the fifth annual premium on said policy by delivering the amount thereof in compliance with the written direction of an agent of the defendant to an expressman to be sent by express; and that the defendant denied said premium had been received, and refused to treat said policy as in force, and in which suit the defendant denied the claims of the plaintiff, and showed that said premium had been embezzled by said expressman, who it claimed was the agent of the plaintiff. But the court adjudged in said suit, that the policy was in force, and that said defendant should treat said policy as paid up in full, and give the plaintiff all such rights and privileges as by the rules and regulations are given to holders of paid-up policies, which said record purported to be certified by Charles B. Griswold as clerk of the Supreme Court of the State of New Hampshire for the county of Grafton, with the certificate of Isaac W. Hammond, deputy secretary of State, attached, that said record was attested in due form.

It appeared from the testimony of Mr. Hinkley, a witness for the plaintiff, and the agent who took the application for the policy, that when the application was taken, he represented to the plaintiff, that the defendant expected to make 50 per cent dividends on the table rates, but that there was no guaranty or absolute promise that any dividends would be paid. It also appeared by said Hinkley's testimony, that he had a policy in the defendant company for \$2,000 on his life on the annual life rate; that he was about a year older than Sarah M. Currier; that he had made a computation of the amount due on the plaintiff's policy; that in said computation he had allowed dividends in accordance with the statement of dividends received by the plaintiff, so long as they were received, and after that he had allowed dividends in the same proportion that he had received them on his policy, and that he had prepared a statement in which he had figured the amount of the notes given by the plaintiff to the defendant, and applied the dividend toward the payment of the notes. The plaintiff offered said statement in evidence, the admission of which, and all the testimony of said Hinkley in relation

to said statement, computation, and dividend, was objected to by the defendant, but received, subject to all legal objections, to which ruling the defendant excepted.

It appeared from the testimony of Mr. Morley, the actuary of the defendant, a witness on the part of the defendant, that the defendant company was chartered in 1862, and commenced business in 1864; that it was chartered and did business as a stock company, and had a capital stock, and that under its charter it had the privilege of issuing, and had issued, policies with and without the right to participation in the profits of the company; that said company never authorized its agents to promise dividends, or make any representation in regard to dividends; that said company never determined on what basis to divide the profits until 1868. It also appeared, that on the settlement of the fifth annual premium of the plaintiff's policy in 1869, the defendants allowed a dividend of \$87.50; that the plaintiff paid the interest on said notes given in part payment of premiums to November 14, 1870; and that since that date the principals and interest upon said notes had never been paid.

It also appeared in evidence that by the rules and regulations of said company no dividends or profits had been declared by the directors of said company, payable or applicable on policies when the holders thereof had not paid their notes or the interest on their notes which had been given in part payment of premiums, and no dividends or profits had been declared which were payable or applicable on the plaintiff's policy since 1869.

The receipt, referred to in the opinion of the court, was:—

Policy No. 478.	
Annual premium,	\$572 70
Dividend,	87 30
—	
Cash portion of prem.	\$485 40
Interest on notes,	68 72
—	
Total cash due,	\$554 14

Received amount as above
this 24th day of June, 1874.
By P. C. HEADLEY.

Office of the CONTINENTAL INSURANCE CO.,
OF HARTFORD, CONN.

Hartford, Nov. 15, 1869.

Received (as per margin) the 5 annual payment, due Nov. 15, 1869, on policy No. 478, insuring the life of Sarah M. Currier, until Nov. 15, 1870, but this receipt shall not be valid unless payment is made, as stated in the margin hereof, at or before noon of the day when due, and this receipt countersigned by P. C. Headley, agent at Portsmouth, N. H.

ROBT. E. BEECHER, Secretary.

Issued pursuant to decree of S. J. Court of the State of New Hampshire.

ROBT. E. BEECHER, Sec'y.

CHARLES W. PORTER, *for the Defendant.*

The record of the New Hampshire court was not properly authenticated: Rev. St., U. S., s. 905; 103 Mass., 283; 1 Iowa, 1; 4 Wis., 45.

The policy did not promise any dividends of profits, and no claim to them was alleged in the declaration. Hinkley's testimony was not admissible to vary the terms of the policy, or notes: *Bliss Ins.*, s. 375; *Lamott vs. Ins. Co.*, 17 N. Y., 199; 40 N. J. L., 568; *Ins. Co. vs. Mowry*, 96 U. S., 545. The plaintiff had no insurable interest in the life of his wife: *Bliss Ins.*, p. 16. There is no estoppel because of Hinkley's representations: *Ins. Co. vs. Mowry*, *supra*; *Durant vs. Pratt*, 55 Vt., 272.

S. C. SHURTLEFF, *for the Plaintiff.*

The question, whether the plaintiff had an insurable interest in the life of his wife, is not in the case. If there is any reason why the contract is void, the defendant must show it. The court will not presume it. But as the earnings of the wife belong to the husband, he has an insurable interest in her life. The plaintiff's evidence was admissible: *Brooks vs. Phenix Life Ins. Co.*, 8 Reporter, 774.

TART, J.

I. After the testimony was closed, the defendant moved that a verdict be directed in its favor on the ground that the plaintiff had not proved an insurable interest in the life of his deceased wife, the said Sarah M. Currier. The motion was denied. The defendant insists, that the plaintiff had no insurable interest in the life of his wife, and that, therefore, the contract was against public policy and void. This objection would have come with more grace from the defendant at the time it was asked to enter into the contract, and before the receipt of nearly three thousand dollars of the plaintiff's money. As Parker, Ch. J., said in the leading case of *Lord vs. Dall* (12 Mass., 115), where a like objection was made: "Nor can it be easily discerned why the underwriters should make this a question after a loss has taken place, when it does not appear that any doubts existed when the contract was made, although the same subject was then in their contemplation."

Admitting that the rule as to the interest necessary to support a contract of life insurance is, that the interest must be a pecuniary one, we think that where no facts are shown in relation to the wife, the presumption is, that the husband has an insurable pecuniary interest in her life. He is entitled to her services. There are many cases where she is the real support of her husband and family, or as is sometimes said, she is "the man of the house." In all ordinary cases the husband has a deep interest in the continued life of the

wife. Cases may exist where the husband has no interest whatever in his wife's life. She may be a burden—a hopeless maniac, or invalid; and such facts may require the application of a different rule. There are none such in this case; and we only hold that the presumption is, that the wife is a help-meet, and the husband has an interest of a pecuniary nature in her living.

II. The defendant was entitled to five premiums on the policy in question. The payment of four was conceded. The company's receipt for the fifth was in evidence. (See statement of the case.) The payment as per the receipt was conceded. It was immaterial then whether the record of the proceedings in New Hampshire was properly authenticated or not. If the receipt was actually given, what difference does it make, whether it was given voluntarily or as the result of a controversy? There is no question of duress in the case, and we think the payment was shown by the receipt, and do not pass upon the question as to the record. That the company was compelled to give the receipt by decree of court does not change its force or effect.

III. The policy was issued, indorsed with the words, "with profits," and by force of the indorsement the plaintiff was entitled to profits. Such being his right by the contract, the admission of parol testimony, with the prospectus and circulars, to show such right, if error, was harmless. The plaintiff was entitled to profits by the terms of his contract, without further testimony.

IV. The defendant had the right to deduct from the amount of the policy the sum due from plaintiff upon the notes given by him in part payment of the premiums. The only evidence of profit was that of the witness Hinkley; and as no question was made by defendant but that it was correct, if the plaintiff was entitled to profits, we perceive no error in the ruling of the court directing a verdict for the face of the policy with profits according to the Hinkley statement, deducting the amount of the plaintiff's notes, and its judgment is affirmed.

SUPREME COURT OF VERMONT.

OCTOBER, 1885.

CONTINENTAL LIFE INS. CO. }

vs. }

JOHN CURRIER.*

A bill in equity, brought to restrain the collection of a judgment, will be dismissed, when every question involved was litigated in the suit at law,—the pleadings permitting it, and the evidence the same, except more in detail.

In Chancery.

Bill in chancery. Heard on a master's report, March term, 1885, Washington County, Powers, chancellor. Bill dismissed.

The suit at law, John Currier vs. Continental Life Ins. Co., is reported in 57 Vt., 496. That case was an action of assumpsit brought upon the same policy of insurance which is the subject matter of this litigation. In that case the defendant pleaded the general issue, tender, and offset. The policy was dated November 14, 1865, and was issued upon the life of Sarah M. Currier, wife of said John Currier. The policy was issued upon the "half-note plan." The exceptions in the action at law state :—

"The defendant offered in evidence said four premium notes, which are referred to and made a part hereof.

"After the testimony was closed the defendant asked the court to rule that the plaintiff could not recover, for the reason that the plaintiff had not alleged or proved an insurable interest in the life of Sarah M. Currier; but the court refused to so rule, to which ruling the defendant excepted.

* From advance sheets of 58 *Vermont Report*.

"The court directed a verdict, pro forma, that the plaintiff recover of the defendant the amount of said policy less the amount of said notes and interest, after allowing the dividends toward the payment of the notes, in accordance with the statement and computation by Mr. Hinkley, to which the defendant excepted."

The judgment below was affirmed by the supreme court. The master found in this proceeding, in part, as follows :—

"As before stated, the sum of \$554.12, by defendant sent to orator, by express as aforesaid, included the interest to November 15, 1870, upon all of defendant's notes held by orator. Defendant never paid any more interest on his notes unless he was entitled to dividends which should have been applied to the extinguishment of interest.

"The policy matured by the death of the said Sarah M. Currier on the 3d day of February, 1882. In June, 1882, orator sent defendant its check for the sum of \$2,677.91, being the amount orator claimed defendant was entitled to receive, which amount was the face of the policy without dividends, less the amount of defendant's four outstanding notes. Defendant refused to receive said check in settlement of the policy and returned the same to the orator, and soon after commenced his action at law upon said policy in Washington County court against the orator, which suit was made returnable to the March term, 1883, of said court, and was continued to and tried at the September term of the same year before a jury. In that case defendant (then plaintiff) claimed to recover the sum insured in and by said policy, less the amount of said notes after applying thereon dividends which he then and now claims were voted by orator's board of directors, and which defendant claims have been paid to other policy-holders. Defendant obtained a verdict and judgment thereon for all he claimed." * * *

"In December, 1883, the company changed its dividend plan to what is called the 'contribution plan,' by which plan the policy-holder is allowed as a dividend the amount by his policy contributed to the surplus, as near as can be ascertained

"It is claimed by orator that defendant is not entitled to dividends because he failed to pay the interest in advance on his notes after November 15, 1870. In respect to this claim it is found that defendant understood, when he made application for, and when he received this policy on the half-note plan, that he would be required to pay the interest in advance upon his notes, and for five years he did so pay the interest.

"The orator never in any of its circulars, or in any other manner, informed defendant, or any other policy-holder, that failure to pay interest on notes given for premiums, or any part thereof, would be deemed a forfeiture of right to dividends. No vote was ever passed to that effect by said board of directors, nor was there any by-law to that effect.

"Defendant claims that he is entitled to dividends more than sufficient to cancel all interest on his notes.

"It is claimed that the judgment in the suit at law in Washington County court, affirmed by the supreme court, constitutes a bar to this suit. In respect to this claim it is found:—

"That the same evidence was before the jury in the suit of Currier vs. Continental Life Ins. Co., in Washington County court, hereinbefore referred to, as was before the master in this cause, varying only in detail. In the former case the claims of the parties were the same as made in this case. The testimony was substantially the same, except that before the master the matter was gone into more in detail. But orator claims that the subject matter of this litigation is adapted only to a court of equity, and that orator in a court of law could not avail itself and have the full benefit of its defense.

"Since 1877 no dividends have been paid to stockholders upon the capital stock of the company; prior to that time dividends were paid annually to the stockholders, varying from 2 to 8 per cent, but upon what amount of stock or whether the same was paid in or otherwise, did not appear in evidence."

The bill was brought to restrain the collection of the judgment rendered in the suit at law. It was claimed that the defendant was not entitled to dividends.

C. W. PORTER, *for the Orator.*

This suit was brought to restrain the collection of the judgment against the orator, specified in the master's report, and for an adjudication that the defendant was not entitled to have the sums claimed as dividends applied toward the payment of the notes given for premiums, upon equitable grounds.

The orator has equitable rights, not cognizable in a court of law, which, in a court of equity, should prevent such an adjudication as was made in the suit ^{at law}: Story Eq. Jur., s. 1,573; Dunham vs. Downer, 31 Vt., 249.

It was inequitable to allow a mortuary dividend upon the defend-

ant's policy, when none have been allowed by the company in settlement of policies since 1870.

No dividends have ever been allowed or declared on paid-up policies whose holders have failed to pay interest on their notes; and the holder of this policy should stand no better than his fellows.

By non-payment of interest on notes, in violation of his contract, the defendant forfeited the right to dividends. The company has never paid nor declared dividends on policies whose holders had not paid interest on their notes.

S. C. SHURTLEFF, for the Defendant.

The judgment in the suit at law is a bar. The evidence, the issues, and the parties are substantially the same: *Tylor vs. Hamerley*, 44 Conn., 419; *Bellows vs. Stone*, 14 N. H., 203; *Nat. Bank vs. Burnet Mfg. Co.*, 33 N. J., 486; *Windfield vs. Bacon*, 24 Barb., 154; *Savage vs. Allen*, 54 N. Y., 458; *Briggs vs. Shaw*, 15 Vt., 78; *Fletcher vs. Warren*, 18 Vt., 45; *Day vs. Cummings*, 19 Vt., 496; *Dunham vs. Downer*, 31 Vt., 250; *Truly vs. Wanzer*, 5 How., 141; *Creath vs. Sims*, 5 How., 192; *Walker vs. Robus*, 14 How., 584; *Smith vs. McIver*, 9 Wheat., 532; *Henderson vs. Huckley*, 17 How., 443; *Ayard vs. Valancia*, 39 Cal., 292; *Duncan vs. Lyons*, 3 John Ch., 356; *Foster vs. State Bank*, 17 Ala., 692.

TAFT, J. Every question in this case was litigated in the suit at law. The pleadings permitted it; the evidence was the same, varying only by being more in detail in this cause. The case having been once adjudicated this bill was properly dismissed.

Decree affirmed and cause remanded.

COURT OF APPEALS OF NEW YORK.

O'REILLY, *Respondent*,

vs.

CORPORATION OF THE LONDON ASSURANCE,
Appellant.*

Where the policy stipulated that it should be continued, provided the premium was paid and indorsed or a receipt given; also that the company should not be liable by virtue of any renewal unless the premium was paid, a mere casual conversation with the agent, requesting him to renew it at a subsequent date, but which contemplated further action, and where no premium was paid or credit agreed upon, was not a valid renewal.

LOUIS MARSHALL, *for Appellant*.GRAY and KLINE, *for Respondent*.

EARL, J.

From 1876, until after the commencement of the action, one Amos Jackson was the agent of the defendant in this State, under a written appointment by which his powers were limited and described as follows: "To receive proposals for insurance against loss and damage by fire in Jordan and vicinity, to fix rates of premiums, to receive moneys and to countersign, issue, renew, and consent to the transfer of policies signed by the managers for the United States for the London Assurance Corporation, subject to the rules and regulations of said company, and such instructions as might be given from time to time by its managers." He was furnished by the defendant with blank policies signed by the secretary, which he filled

* Decision rendered, March 16, 1886.

up when applications for insurance were made to him; he entered the insurances effected by him in books kept by him, made to the company daily and monthly reports of his transactions, and made monthly remittances of premiums. On the 14th day of August, 1879, he issued a policy to one Nicholas Craner, upon a building owned by him in the village of Jordan, insuring him against loss by fire to the amount of \$1,500 for one year from that date. The policy contained the following provisions: "This insurance (the risk not being changed) may be continued for such further time as shall be agreed on, provided the premium therefor is paid and indorsed on this policy or a receipt given for the same, and it shall be considered under the original representation and for the original amounts and divisions unless otherwise specified in writing." "This corporation shall not be liable by virtue of this policy or any renewal thereof unless the premium therefor shall be actually paid." In July, 1880, about four weeks before the expiration of the policy, Jackson went to Craner, and had the following conversation with him as detailed by Craner in his evidence: "He came in and said I had better put another thousand dollars upon the building. He wanted to know if I was not ready. I said I would run a little risk myself, but I thought that I would not then. Then he spoke about the other, and said it would not be but \$15 the next year, and that was low. I told him I thought it was very reasonable, but that I would run some risk myself. I don't know whether he said when it expired. He said he wanted to put on another thousand. He did some little trading, I guess, with me at the time. He didn't say any more then; that is all the conversation I remember at the time. Question. Did you state to him that you would pay the policy? Answer. Nothing was said about it; I told him to renew the policy—it was \$1,500, and he wanted a \$1,000 more. I understood him to say he would renew it." Craner's son testified that he heard the same conversation and he stated it as follows: "Jackson wanted to put on a \$1,000 more; father said he thought he would run some insurance himself; Jackson thought it would be but 1 per cent, more now, or \$15 for \$1,500; father said he knew it was low but that he would carry but \$1,500; Jackson said he was a good customer of father's and would like some of his insurance business; father said he would carry that, and Jackson said all right, he would renew it for another year; my father told him at the store all right, to keep it in force; that was at the store in 1880; Jackson said he would. Jackson, called as a witness for the plaintiff, gave a different version

of the conversation, and substantially denied that he agreed to renew the policy.

The property insured was destroyed by fire on the 2d of February, 1881, about seven months after this conversation; and in the mean time, although Craner and Jackson were near neighbors and met almost daily, they had no conversation whatever about the insurance or the renewal of the policy, and the subject was never mentioned between them. No renewal receipt was ever executed or given by Jackson to Craner, and the renewal was not indorsed on the policy, and no entry of the renewal was ever made on any paper or in any book by Jackson. The premium was not paid or tendered or otherwise arranged, and no report of the renewal was made to the defendant, and no action whatever was taken by either party in reference thereto previous to the fire. By the same fire which destroyed Craner's building Jackson lost a building which was insured by the defendant, and he was present at the fire, and upon informing the defendant of his loss, congratulated it and himself for not having any risk upon Craner's property; and upon being spoken to by Craner the next day after the fire, he stated to him that he was not insured; and during six months thereafter Craner made no claim upon his policy and gave no notice of his loss. In January, 1882, he transferred his claim against the defendant to the plaintiff, who paid \$1 therefor, and in addition thereto agreed to give him one-half of what he should recover of the defendant.

Upon these facts we think it cannot be held that Craner had a valid insurance or a valid contract for insurance upon his property; there was no present renewal of his policy, and considering the terms of the policy and all the circumstances, we think Craner and Jackson could not have supposed or understood that a binding contract for renewal had been made. The premium was not paid or arranged in any way, and it was not agreed that credit should be given therefor. There was nothing but the casual conversation detailed by the two witnesses, which took place four weeks before the renewal would be needed. Further action must have been contemplated by the parties to the transaction. Craner should have paid or tendered the premium and asked for the renewal. It cannot be held that payment of the premium was waived, as the defendant knew nothing about the alleged renewal, and Jackson either did not understand that there was any renewal or had forgotten the conversation he had had with Craner.

In order to uphold and enforce this insurance we would have to

go further than any decision of this court has yet gone, and lay down an impolitic rule which would make the business of insurance transacted through agents all over the country, far away from their principals, altogether too hazardous and uncertain. Therefore, without noticing other points argued on behalf of the appellant, we are of opinion that the judgment should be reversed and new trial granted, costs to abide event.

All concur, except Danforth, J., not voting, and Rapallo, J., absent.

SUPREME COURT OF WISCONSIN.

Appeal from Circuit Court, Jefferson County.

HUSTISFORD FARMERS' MUTUAL INS. CO. }

vs. }

CHICAGO, M. & ST. P. RY. CO.*

An insurance company that settles a loss due to the negligence of a railroad, may take an assignment of the claim of the insured against the road, and recover the whole amount of damages thereunder, though in excess of the sum actually paid by itself.

HALL & SKINNER, *for Respondent*, Hustisford Farmers' Mut. Ins. Co.
JOHN W. CARY and BURTON HANSON, *for Appellant*, Chicago, M. & St. P. Ry. Co.

COLE, C. J.

The plaintiff is a town insurance company, organized in April, 1875, under chapter 103, Laws 1872. It issued its policy to one Gottlieb Schwantes, insuring him against loss or damage by fire or lightning to the amount of \$800 on his buildings and personal property therein. During the life of the policy a loss occurred which was occasioned, as the jury found, by a fire starting on the defendant's right of way, and extending to the adjacent premises of the insured. The jury also found that the defendant was guilty of negligence in not keeping its right of way free from dry grass and other combustible material, which occasioned the loss. The insured sustained a loss by the destruction of his property exceeding the amount of his policy. The plaintiff paid him under its policy \$626

* Decision rendered, April 6, 1886.

in full payment and settlement thereof, and took an assignment of his entire claim for damages against the defendant. The plaintiff seeks to recover of the defendant \$866, being to the full extent of the loss as alleged in the complaint, which the insured sustained, and under the ruling of the trial court had judgment for that amount, together with interest from the commencement of the suit. The real question in the case is as to the correctness of this ruling. On the part of the defendant it is insisted that the plaintiff had no power or authority to take an assignment from Schwantes of his claim against the defendant; that such an assignment was void, and cannot be made the basis of an action against the defendant; that if the plaintiff is entitled to recover at all, it is only by reason of its right to be subrogated to the position of the insured to the extent of the amount paid him on its policy. To this it is said, on the other side, that if the plaintiff had not owned a part of the claim against the defendant for the loss at the time of the assignment it well might be that it could not purchase and enforce it; but, under the circumstances, the assignment was not *ultra vires*, because the plaintiff did, in fact, by the payment of its policy, become the owner of a large part of the claim, which was indivisible, and that there is no principle of law which would prevent it from acquiring the interest of the insured therein, and recovering the whole claim.

We are disposed to adopt the latter view as correct. It is said the assignment in question was absolutely void as being taken by the plaintiff without either the express or implied authority of law. The statute authorizing the formation of these town insurance companies provides that the corporation so organized "shall possess the usual powers, and be subject to the usual duties, of corporations." Section 1., c. 103. This, of course, restricted the company to the business of insuring the class of property mentioned and situated within the specified limits. In issuing its policy to Schwantes it is not pretended that the plaintiff exceeded its powers in any respect. It merely transacted the business it was authorized by law to do, in the ordinary way, and by the usual means. When a loss occurred on its policy it had to make good its obligation. On paying the loss it had, upon well-established principles, a right of action against the defendant, without any assignment of such right by the assured, for the amount which it had been compelled to pay. In this case, as the property destroyed exceeded in value the amount of the policy, the plaintiff and Schwantes might have united in an action against the defendant to recover their respective claims: Swarthout

vs. Chicago & N. W. Ry., 49 Wis., 625; s. c. 6. N. W. Rep., 314. And it seems to us, under the circumstances, that the plaintiff had the power to settle with the insured when a loss occurred, and to take an assignment, because this might be necessary or convenient for the transaction of its business. We perceive no valid reason for saying the plaintiff had no capacity to take an assignment upon the facts of the case, or that it was prohibited by law from doing so. The plaintiff may not purchase and take an assignment of a claim where it has no interest; but where it becomes the absolute owner of a part of the claim, while acting within the scope of its granted powers, why may it not acquire the rest of the claim by assignment and enforce it? It can certainly work no hardship or oppression to the wrong-doer. There can be no doubt of the soundness of the proposition that the powers of a corporation organized under a statute are such as the statute specially confers, or such as are necessary for the purpose of carrying into effect the powers expressly granted. This court has frequently, in its decisions, sanctioned this principle, and we do not intend to decide anything in conflict with that doctrine here. We do not feel called upon to go over our decisions, to which we referred on the argument.

Dietrich vs. Madison Relief Ass'n, 45 Wis., 79, is much relied upon by defendant's counsel to sustain the position that the assignment in this case was void; but that case is not in point, as an examination of its facts will show. The company there was restricted to the business of insuring the lives of its members for the relief of their widows and children. Dietrich, whose life was insured, assigned his agreement or policy to the company as security for certain notes executed or transferred by him to it for loans of money. This assignment was held void at the suit of the heirs because it was made to secure a loan of money—a business transaction which the company had no right to engage in. But here the insurance and recovery of the loss from the defendant were strictly in the line of the plaintiff's business, and, as it owned a part of the claim, it might properly take an assignment of the rest, and recover upon it. The judgment of the circuit court is affirmed.

SUPREME COURT OF PENNSYLVANIA.

Error to the Court of Common Pleas of Wayne County.

BARKER

vs.

BEEBER, RECEIVER OF THE LYCOMING FIRE INS. CO.* }

In collecting assessments upon premium notes held by an insurance company, under the act of July 26th, 1842, it is not sufficient, in order to authorize execution, merely to file an affidavit by the receiver that the statement annexed is copied from the books of the company, without alleging that it is true, and without giving in detail the losses. The oath should be made by the treasurer in the absence of any evidence to show his death or refusal to swear.

H. WILSON, Esq., for Plaintiff in Error.

GEORGE G. WALLER, Esq., for Defendant in Error.

PAXSON, J.

This was a proceeding on the part of the receiver of the Lycoming Fire Insurance Company, to collect from the defendant below the amount of certain assessments upon his premium note held by said company. It was instituted under the eleventh section of the act of July 26, 1842, P. L., 426. The right of the company to enter judgment upon its premium notes under this act was settled in *Krugh vs. Insurance Co.*, 77 Pa. St. R., 15, and in *Halpenny vs. People's Ins. Co.*, 85 Ind., 48. But this proceeding is in derogation of the common-law rights of the insured; it gives a summary, if not a harsh remedy to the company, and must be strictly construed. To entitle the company to enter a judgment and issue an execution against a man who has neither confessed judgment nor had a judg-

* Decision rendered, April 5, 1886.—From *Legal Intelligencer*.

ment recovered against him by a suit, all the requisites of the act must be strictly complied with.

The said act provides : "That before any execution shall be issued against the members of said company, it shall be the duty of the officers of said company to cause to be made out a statement of the amount of premiums received, and the manner in which the money of the company has been expended, and file a copy thereof, attested by the oath or affirmation of the treasurer, in the office of the prothonotary of each county wherein members of said company reside who are to be affected by the issuing of such execution."

The affidavit filed in this case was made by the receiver, and sets forth "that the above and foregoing statement has been taken from the books of the Lycoming Fire Insurance Company, and shows the amount received and expenses during the time therein mentioned, as appears by said books, vouchers, and papers of said company, and is correct to the best of his knowledge and belief." The statement referred to is composed of a number of papers showing the receipts and expenditures between stated periods. They give details to some extent, but are lumping just where they should have been specific. As an illustration I will take the statement contained on page 11 of the plaintiff's paper book. It purports to show the condition of the company between May 1, 1879, and February 25, 1880, the time covered by assessment No. 38, from which it appears that the amount paid for officers' salaries was \$20,747, and for losses and damages by fire, \$233,086.52. These large items are given with an entire absence of detail. We may assume, without violence to the act of Assembly, that its object in requiring this statement as a preliminary step to the issuing of an execution, was to give the assured reasonable information as to the expenditures of the company in order that he may have a day in court to contest its validity or correctness. But how is the insured to test its correctness when the whole amount of losses paid is stated in a gross sum, without any information as to whom such losses have been paid, and the amounts of such payments respectively? And if he should think that the munificent sum paid for officers' salaries was unreasonable under the circumstances, how can he test its correctness with no detail as to the number of officers, or the amount paid to each? It is no answer to this to say, that it would involve figures and extend the statement. Where a company is allowed by law to enter a judgment and issue execution upon a plain note, without any suit or proceeding whatever against the debtor, it is not too much to require that the latter

shall have full information of what his money is to be taken for, before an execution shall go out against him to collect it. If it requires additional clerical labor, the company must procure it; in this particular case the amount charged for such services would appear to have been ample for such purpose.

But there is another difficulty. The act of 1842 requires that the statement shall be attested by the oath of the treasurer. It does not say the treasurer or other officer. The palpable object of requiring it to be made by the treasurer was that he is supposed to have actual knowledge of the items in the statement. The oath in this case was made by the receiver, and it practically amounts to no more than saying that the statement is a correct copy from the books. And when he says, "it is correct to the best of his knowledge and belief," he evidently means that it is a correct copy from the books. This is not what the act contemplates, nor what it says. It makes no reference to what appears upon the books. It calls for an oath sufficiently precise as to render the treasurer liable to an indictment for perjury if it is false, even though the books should sustain every word of it.

But it is said that the company being insolvent and in the hands of a receiver, there is no treasurer to make the required oath. This is begging the question. It nowhere appears that the person who was treasurer, and made the disbursements, is not alive and willing to make the requisite oath. It is not necessary for us to decide that in case of the insolvency and dissolution of a company, and the death of the former treasurer, or his refusal to make the oath, it could not be made by some other person having knowledge of the facts; but we do decide that a mere statement from the books without the oath of any one that the disbursements therein referred to were actually made, is not a compliance with the act of 1842, and does not justify the issuing of an execution. The judgment entered against the defendant below must stand, but it was error to refuse to set aside the writ of *feri facias*, and to this extent the order of the court below must be reversed.

Gordon, J., dissents.

: SUPREME COURT OF PENNSYLVANIA.

Error to the Court of Common Pleas of Berks County.

RUTH

vs.

KATTERMAN ET AL.*

A mutual aid society issued two certificates of membership or policies on the life of A, amounting to \$5,000; the beneficiaries were B, a stranger, and C, a son of A, but the latter only to the amount of \$200. Eighteen days afterwards B assigned to D, who paid all the costs and fees up to the death of A. After A's death D made a compromise with four of the heirs and also with the widow, who, on payment of an agreed sum, assigned all their interest to D. After payment of these sums, and of \$200 to a minor heir, the society paid the balance of the insurance to D. The administrators then brought suit against D to recover this money.

Held, That B and D had no insurable interest in decedent's life, and that D could only hold the amount which he had expended as fees and costs. And *held*, further, that as one of the heirs was a minor the assignment of the four heirs and the release of the widow was properly rejected as evidence in this suit. That is a matter for the orphans' court.

Messrs. HIRAM Y. KAUFMAN, H. O. SCHRADER, and FRANK R. SCHELL,
for Plaintiff in Error.

Messrs. WM. H. LIVINGOOD and BASSLER BOYER, *Contra.*

GORDON, J.

From the statement of this case as furnished to us by the counsel for the plaintiff in error, defendant below, we gather the following facts, which are the controlling features of the contention in hand: On the 5th of September, 1874, the United Brethren Mutual Aid Society of Lebanon, Pennsylvania, issued two certificates of member-

* Opinion filed, March 29, 1886.—From *Pittsburgh Legal Journal*.

ship, or policies on the life of Benjamin Katterman, the one for \$2,000 and the other for \$3,000. The beneficiaries therein mentioned were one John Levy and Thomas Katterman, a son of the assured, the latter, however, only to the amount of \$100 in each policy. Eighteen days after the date of these certificates they were assigned by Levy to James Ruth, who paid all the costs and fees, together amounting to \$1,951.40. On the 20th of March, 1882, Katterman died. Immediately upon his death his heirs notified the society of their protest against the payment of the policies to Ruth. Thereupon there appears to have been a compromise between him and four of the heirs which resulted in an assignment of their several interests to the defendant in consideration of the sum of \$363. The widow also interposed and received \$500 from the society in full payment of her claim. After deducting these several sums of money, together with the \$200 belonging to Thomas Katterman, a minor heir, there was paid over to Ruth \$3,094.69. This sum, less assessments and expenses in the taking out and maintaining the policies, is now claimed by the administrator of the decedent's estate. The learned judge of the court below held that these policies, as to Levy and Ruth, who had no interest in the decedent's life, either as near relatives or creditors, were speculative, and mere wagers on Katterman's life, and that, under the doctrine of *Gilbert vs. Moose*, 8 Out., 74, and similar cases, the defendant could hold of their proceeds, as against the representatives of Katterman's estate, only the amount which he had expended in the way of fees and expenses. The position thus assumed by the common pleas is one that is too well settled to require discussion, nor can we discover that it was seriously controverted by the learned counsel for the defense. Complaint, however, is made that the court refused to admit in evidence and submit to the jury the assignments of the four heirs and the settlement with the widow. But we cannot see what legitimate purpose such admission could have subserved. Had all the heirs, supposing them to have been *sui juris*, released to Ruth, together with the widow, this might have operated under the doctrine of *Walworth vs. Abel*, 2 P. F. Smith, 370; *Weaver vs. Roth*, 9 Out., 409, and similar cases, as an equitable defense.

But one of the heirs was a minor, and neither did nor could join in the alleged assignment. As, therefore, the estate must, at all events, go to distribution, it certainly would have been improper for the common pleas to have attempted to anticipate and forestall, even in part the action of the orphans' court. Indeed, it would have

been impossible so to do, for the expenses of administration not having been ascertained, the amount to which the defendant, by virtue of his assignments, would be entitled, could not, in this action, be certainly determined. Nor are his rights at all affected by the judgment in this case, for on final settlement of the estate the orphans' court has full power to judge between him and the widow and heirs, and award to him that which is justly his due. We must, therefore, dismiss the first and third assignments of error. Nor can we sustain the second. The complaint therein contained we give as follows: "The court erred in rejecting the offer of the defendant, which is as follows: 'The defendant's counsel propose to show, by the witness on the stand, that in settling policies of insurance with policy-holders, it is the custom to allow an equated interest upon all moneys paid into the association in the shape of assessments, or, in other words, 6 per cent interest on the whole amount for one-half the time.'"

The court could not perceive the relevancy of this offer, hence, rejected it. As we are unable to understand this proposition we cannot say that the court did wrong in not adopting it. The offer is not to prove a fact, as that the defendant had to pay something for which, in this suit, he was entitled to a credit, or that the company allowed him a rebate with which he should have been charged; neither was the court asked to hold that he should be allowed interest on the money which he actually did pay, but that, "In settling policies of insurance with policy-holders it is the custom to allow an equated interest upon all moneys paid into the association in the shape of assessments." Certainly the question concerned not a general custom of insurance companies, or of this particular company, but rather what was fact as to this transaction. If, indeed, he was allowed the rebate here mentioned, it was an easy matter for him to have proved it, and proof of a custom would not have availed him unless he could show that it was applied to his own case. It follows that his offer was altogether barren and useless, and the court did well to reject it.

The judgment is affirmed.

UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF NORTH CAROLINA.

ROYSTER ET AL.

vs.

ROANOKE, N. & B. S. B. CO. ET AL.*

Where owners of certain cotton ship it by a carrier, and obtain insurance on it, and the carrier, at the time, has annual policies covering the cargoes of its steamer, which policies contain a clause limiting the insurance to the interest of the insured, and a fire occurs, this does not constitute double insurance, and the shipper's insurers cannot make the carrier's insurers contribute to their loss.

In Chancery.

This is a suit in chancery by the plaintiffs on behalf of their insurers, the Union Insurance Company, against the defendant, to compel it and its insurers to contribute to a loss under the following circumstances: The steamboat company is a common carrier. It received from the plaintiffs certain cotton for transportation on its steamer *Commerce*. The said steamer, with her cargo, was destroyed by fire. No negligence in the matter was charged. The plaintiffs had insurance on their cotton in the Union Insurance Company, which paid them \$3,900 on their loss. The steamboat company also had insurance to the amount of \$10,000 in policies dated January 27, 1883, and running a year, made payable to the steamboat company for the benefit of whom it might concern. They were not floating policies, covering the goods on the special trip during which the fire occurred, but policies covering many goods on many trips.

* Decision rendered, January, 1886.—From *Federal Reporter*.

The fire occurred on December 6, 1883. After the fire, the steamboat company compromised with its insurers by collecting \$4,060.89, and applying it to the re-imbursement of those of its shippers who were uninsured. This suit is brought by the plaintiffs, for the benefit of their insurers, against the steamboat company and its insurers, claiming that there was double insurance, and that the plaintiff's insurers can make the insurers of the steamboat company contribute to their loss. The only defendant insurers who have been served with process, and answered, are the Royal Insurance Company and the London & Lancashire Insurance Company, each of whom paid \$1,015.22 under the circumstances above mentioned. The material portion of the policies of the defendant companies (taking the Royal as a sample, as they were all identical except as to names and amounts) is as follows:—

The Royal Insurance Company, * * * in consideration of \$50, * * * do insure the Roanoke, N. & B. Steamboat Company, against loss or damage by fire, to the amount of \$2,500, the property hereinafter described, *On all goods, wares, and merchandise generally, including cotton in bales,—their own, or in their care or custody as common carriers or warehousemen,—while in transit on board their steamer Commerce.* * * * Loss, if any, payable to said company for account of whom it may concern. * * * And the said * * * company hereby agree * * * to make good unto the said assured * * * all such immediate loss or damage, not exceeding in amount the sums insured as above specified, nor the interest of the assured in the property, except as herein provided, as shall happen by fire, etc.

That portion of the above in italics was in writing, the balance was in print.

RICHARD WALKER, and WALTER CLARK, *for Complainants.*
ROBERT M. HUGHES, *for Defendants.*

BOND, J.

This cause was submitted on the bill, answer, and exhibits, with an agreed statement of facts therein, and was argued by counsel.

The court is of opinion that the complainants are not entitled to recover. The complainants shipped, on board the defendant's steamboat, seventy-eight bales of cotton. The steamboat with all its cargo was destroyed by fire. The complainants had insured, as owners, the cotton in their own names, to the extent of their estimate of its value to them. The defendant company had a policy for a year covering all cargoes on board, limiting the liability of insurers to the extent of the interest of the insured in the cargo.

The steamboat company had no interest in the complainant's cotton, and, when it was consumed, was paid nothing on account of its loss. The company was under no obligation to insure its cargoes, and did not do so further than to protect its interest for freight, charges, and loss accruing from the negligence of its employees. This is not double insurance, which makes a proper case of contribution between the several insurance companies. To make such a case, the property insured and the interest insured must be identical. A decree will be signed in accordance herewith.

SUPREME COURT OF MICHIGAN.

UNION MUT. FIRE INS. CO. }

vs. }

{ SPAULDING.*

Where in a mutual company a member has paid his proportion of existing losses and assessments levied, and has withdrawn and surrendered his policy, he is not liable for an existing deficiency not discovered until after his withdrawal.

HARVEY JOSLIN, *for Plaintiff and Appellant.*

MAHER & FELKER, *for Defendant.*

CAMPBELL, C. J.

Defendant was sued as a member of the Mutual Insurance Company, which is plaintiff, for the proportion calculated according to his premium note on an assessment. He surrendered his policy, May 1, 1884, and on that day paid \$100, which was his full proportion of the only assessment then outstanding, and that assessment had been called for \$19,759.86, which covered all losses existing at the time it was made, and a further sum of \$1,683.99 for estimated expenses and shortages. In November, 1884, a deficiency of \$3,791.98 remained unpaid on this assessment, in addition to a further loss claim of \$1,094, and a new assessment of between \$7,000 and \$8,000 was made to provide for this deficiency. Defendant was notified, but refused to pay. Some questions arose upon the regularity of the assessments, but they are not important, as we consider the facts. Facts are fully found and judgment was given below in favor of defendant on the merits.

The statute leaves the relations and liabilities of members to be governed by the charter in most respects. The charter of this com-

* Opinion filed, April 22, 1886.

pany provides that any member may withdraw, on application to the secretary, by surrendering his policy, "and paying to the secretary his proportion of all assessments to which this company is liable at the time of withdrawal." The by-laws contain the same provision in slightly different words: "By paying his proportion of all assessments, if any, at the time of his withdrawal."

There can be no doubt on the findings that defendant did pay in full all that was his proportion of any existing losses of the company, as well as of any assessment levied. Whatever losses subsequently arose from failures to collect, or from any other cause, were not existing losses. He was very clearly, we think, within the language of the charter and by-laws. The purpose of a surrender is undoubtedly to cut off all future relations between the parties.

This subject was within the contemplation of every one when the charter was drawn and when defendant became insured. It is a customary and reasonable arrangement. There would be no object in providing for a surrender which would continue to be of no avail so long as any default might exist on the part of any other member. A complete collection of the assessment may never be made, and no one can ever tell, on such a condition, when his membership ceases.

There may be circumstances which, by reason of fraud or serious error, might render a surrender inoperative. But it can never be presumed that serious deficiencies will arise in a well-managed company, and such a possibility cannot destroy a surrender in good faith. That is an arrangement whereby the company discharges the member from his relations, and there is no legal objection to it. The withdrawal of membership is directly sanctioned by recognitions in the statute under which plaintiff was organized: *How. St.*, § 4,254.

The New York Court of Appeals, in *Hyde vs. Lynde*, 4 N. Y., 387, recognized the finality of such a surrender, where it was afterwards ascertained that claims were good for previous contested losses which were not calculated in the terms of surrender. It is there clearly explained that the purpose of the transaction is to put an end to all future liability, and that it should not be impeached unless for fraud or mistake. We think the doctrine is fair and reasonable. The court below was of this opinion.

The judgment must be affirmed, with costs.

Sherwood and Champlin, J.J., concurred. Morse, J., did not sit in this case.

SUPREME COURT OF MINNESOTA.

OLSON AND ANOTHER

vs.

ST. PAUL FIRE & MARINE INS. CO.*

A building twenty-five feet distant is not contiguous within the meaning of a policy that provides it shall be void in case the risk be increased by the erection or use of any building contiguous thereto.

The language of a policy must be clear and unambiguous and doubt must be in favor of the insured.

CROSS, HICKS & CARLETON, *for Respondents*, Emily Olson and another.

J. W. LUSK, *for Appellant*, St. Paul Fire & Marine Ins. Co.

VANDERBURGH, J.

The defendant seeks to defeat a recovery in this action on account of a breach of one of the conditions in a policy of insurance issued upon the dwelling-house of plaintiff, which runs as follows: "If the risk shall be increased by the erection or use of any building contiguous thereto, * * * without the consent of this company indorsed thereon, then, and in every such case, this policy shall be null and void." In respect to an alleged breach of this condition, the court finds that, subsequent to the issuance of the policy, a cooper shop was erected and operated at a distance of twenty-five feet from the building insured; and that the risk was thereby greatly increased; and that the loss in question resulted from fire communicated from such shop; and that the defendant never consented to the erection of the shop, and received no notice thereof from the plaintiff. It further appears that the plaintiff did not own

* Decision rendered, July 14, 1896.

the land upon which the shop was built, and that a strip of land ten feet in width between the insured property and the shop was owned by a stranger.

The increased risk does not appear to be due to any act of the assured, and the condition under consideration avoided the policy only for increased risk caused by the erection of a building contiguous to the insured property. In the judgment of the trial court the shop was not contiguous to the dwelling insured, under a proper interpretation of the terms of the policy. This construction is, we think, the correct one. It may be that the insurance company intended, by the language used, to include a case like this, because the new building was sufficiently near to greatly increase the hazard to the insured dwelling, though not closely joined to it. It is a well-settled rule of construction that the language of a condition in a policy, being that of the underwriters, and selected by them, must be clear and unambiguous, and any doubt as to its meaning must be resolved in favor of the policy-holder: *Chandler vs. Insurance Co.*, 21 Minn., 88; *Loy vs. Insurance Co.*, 24 Minn., 315; *Cargill vs. Insurance Co.*, 33 Minn., 93; s. c., 22 N. W. Rep., 6.

The situation of the buildings in question was not such as to warrant the court in adjudging them to be "contiguous." The term must be given its proper definition and meaning, as commonly received and understood, to the end that policy-holders may not be misled, or left in doubt, as to their duty. See *Webst. Dict.*, "contiguous" and "adjacent." Plaintiff's building was separated and detached from other buildings when insured. It in fact remained so when destroyed. But the defendant insists that the term "contiguous," as here used, does not mean merely adjoining, or in immediate proximity, but that it is also applicable to objects "near by," and that, upon the facts of this case, it should be held that the shop was sufficiently near to be within the condition. This construction is not admissible. The matter would be left altogether too doubtful and ambiguous for the protection of the assured. We cannot hold that a building twenty five or any particular number of feet from a detached dwelling is contiguous to it: *Arkell vs. Insurance Co.*, 69 N. Y., 193; *Hill vs. Insurance Co.*, 10 Hun, 26. If the company intended to terminate the policy in consequence of the erection of a building within a certain distance of the insured property without its permission, it should have plainly so indicated, by defining the distance, or by the use of appropriate terms. Judgment affirmed.

SUPREME COURT OF NEW HAMPSHIRE.

SCOTT

vs.

PROVIDENT MUT. RELIEF ASS'N.* }

A certificate of membership in a mutual relief association may be reformed after the death of the member by inserting the name of the beneficiary, when it appears that the secretary of the association and the assured both understood, at the time of the application, that the proposed name should be entered upon the record without further direction.

Bill in equity to reform a certificate of membership of George H. Gigar in the defendant association, by inserting therein the name of the plaintiff as beneficiary. The question arises upon a demurrer to the bill. The bill sets out portions of the charter and by-laws of the association, which sufficiently appear in the opinion of the court. It then alleges that Gigar became a member of the association May 31, 1880, paid all dues, and continued in good standing until his death, which occurred suddenly April 8, 1882, from an overdose of aconite. That he was formerly a slave, having been brought from Florida by a military officer at the close of the civil war, and it is not known that he had, at the time of his death, any father, mother or other relative living; that for more than two years before his death the plaintiff had been engaged to be married to him; that he had never named, by entry on his membership certificate, or in any way in writing, the person to whom he desired the benefit to be paid in case of his death, but at the time he made his application for membership he stated that it was his intention that it should be paid to this plaintiff, and subsequently made similar declarations; that he was wholly unconscious from the time he was taken ill to the time of his death,

Decision rendered, March 12, 1886.—From Eastern Reporter.

which was but a few hours, and, therefore, by accident and misfortune, was prevented from inserting the plaintiff's name in the certificate.

C. C. ROGERS, *for Plaintiff.*

BARNARD & BARNARD, *for Defendant.*

SMITH, J.

The defendants contracted to pay a sum not exceeding \$2,000, as a benefit, upon due notice of the death of Gigar, the assured, and the surrender of his certificate of membership, "to such person or persons as he may, by entry on the record books of the association, or on the face of this certificate, direct the same to be paid." The bill alleges, and the demurrer admits, that at the time he made application for membership, he stated to the association—which means to its proper officer or officers—that it was his intention that the benefit should be paid to the plaintiff, to whom he was then, and at the time of his decease, betrothed. The prayer of the bill is for a reformation of the contract, by inserting in the membership certificate the name of the plaintiff as beneficiary, and that the benefit may be paid her.

Section 3 of article 4 of the by-laws makes it the duty of the secretary to keep a record of the members of the association, and the persons "to whom the relief is to be paid." If the fact is found at the trial term that the parties understood direction was given to enter the plaintiff's name upon the record book as the beneficiary to whom the benefit was payable, and that Gigar understood that her name would be so entered without further direction from him, it was the duty of the secretary to enter it, and the accident or mistake was one which equity will remedy. The accident could not be said to have arisen from the negligence or fault of Gigar, so as to preclude relief: Story Eq. Jur., § 105. Nor would it be a case of non-execution of a power as distinguished from a trust, where equity does not afford relief: *id.*, §§ 169, 170.

As equity interposes only as between the original parties and those claiming under them in priority—1 Story Eq. Jur., §§ 105, 165—objection may be obviated by an amendment joining Gigar's administrator as co-plaintiff. She may then prosecute this suit in his name, giving him indemnity if he requires it against costs and expenses. The bill should also contain a prayer that the plaintiff's name may be inserted in the record book as Gigar's beneficiary.

Case discharged.

Bingham, J., did not sit; the others concurred.

LOWER COURT DECISION.

RIGHTS AND LIABILITIES OF PART OWNER OF VESSEL.

District Court, E. D. Wisconsin.

KIRBY

vs.

THAMES & MERSEY INS. CO., LIMITED.

Where an insurer has insured the interest of a half owner of a vessel; and the vessel was stranded during a voyage; and such half owner requests the insurer to render her assistance; and the insurer sends an agent to the vessel with instructions "to render such assistance as is necessary;" and such half owner notifies the insurer that he abandons his interest in the vessel to the insurer; and such agent, with the aid of the master, crew, and such half owner, move the disabled vessel to a harbor; and afterwards, without further orders from the insurer, such agent, the master, and crew, with the aid of such part owner, attempt to navigate the vessel to her home port, which is also her port of destination; and during the voyage the vessel is lost: *Held*, that the insurer is not liable to the owner of the uninsured half interest in the vessel for her loss, and is not, as to him, chargeable with negligence.

Where a policy of insurance on the interest of a part owner of a vessel provides that the insured shall not have a right to abandon unless the amount which the insurer would be liable to pay under an adjustment as of a partial loss, would exceed half the amount insured, nor unless the insurer would receive a perfect title to the subject abandoned. *Intimated*, that a notice of abandonment by the insured to the insurer, before the facts which affect the right to abandonment are ascertained, does not constitute an abandonment under the policy.

Abandonment by one part owner of a stranded vessel of his interest in the vessel to the insurer of such interest does not affect the interest of other part owners, nor the master's control over the vessel, so far as their interest is concerned.

Authority by an insurer to a wrecking master to render "necessary assist-

rendered, April, 1886.—From *Federal Reporter*.

ance" to a stranded vessel does not confer on such agent any authority to accept an abandonment of a part owner's interest, nor authority to navigate the disabled vessel to her home port after having once moved her into a harbor.

Libelant must, to recover, clearly prove his case.

MARKHAM & NOYES, *for Libelant.*

VAN DYKE & VAN DYKE, *for Respondent.*

DYER, J.

The libelant, Kirby, and one Ebert, were owners of the schooner *Arab*, a vessel engaged in lake navigation, each owning an undivided one-half interest. Ebert was managing owner, and his interest was insured in the sum of \$2,000, under a policy issued by the respondent company. The libelant's interest was uninsured. About the first November, 1883, the vessel was stranded near the harbor of St. Joseph, Michigan. The master, Captain Charles Starke, immediately telegraphed to Fitzgerald & Co. the local agents of the insurance company, at Milwaukee, that the vessel was ashore, and requesting assistance. Fitzgerald & Co., at once telegraphed Crosby & Dimick, general agents of the company at Buffalo, saying that help could not be sent from Milwaukee, and that it could be better obtained in Chicago. Crosby & Dimick then forwarded a dispatch to the agents of the company in Chicago to send Martin Blackburn to the vessel, "to render such assistance as was necessary." Blackburn was immediately engaged, and proceeded to St. Joseph. He procured a tug and pumps. Part of the cargo was removed from the vessel, and placed on the pier, and within a few days she was got off, and was taken into the port of St. Joseph. Ebert and the master and crew of the vessel took part in the wrecking operations. On the sixth of November, and before the vessel was got off the beach, Ebert sent a telegram to the Buffalo agent, stating that he abandoned his interest in the vessel to the insurance company. This telegram was written by Blackburn for Ebert. On the same day Ebert sent a similar telegram to Fitzgerald & Co., the local agents at Milwaukee. The proofs show that the Buffalo agents never received the telegraphic notice of abandonment alleged to have been sent to them by Ebert; but Fitzgerald & Co., on the receipt by them of notice of abandonment, forwarded it by mail to the Buffalo agents, who received it some time after the 6th. The schooner was taken into the harbor at St. Joseph, probably on the 9th. Sails were put under her to stop her leaks and keep her afloat, and some portion of that part of the cargo which had been previously taken off was placed again on board. Ebert and the master

and crew took part more or less in this work. Milwaukee was the home port of the vessel, and was the port of destination of both vessel and cargo when she was driven ashore. On the evening of the 10th the tug, with Captain Blackburn on board, took the vessel in tow, accompanied by her master and crew and a sufficient force to keep the pumps in operation, and set out for Milwaukee. The voyage was prosecuted successfully until about 4 o'clock the following morning, when the vessel became suddenly water-logged, and was lost. This suit is now brought by the libellant, Kirby, to recover from the insurance company the value of his one-half interest in the vessel, on the ground that in these transactions Captain Blackburn was the representative and agent of the company, exercising control over the vessel; that he was guilty of gross negligence in attempting to take her across the lake when she was in an unseaworthy condition, and that in consequence of such neglect she was lost.

I cannot doubt that Captain Blackburn, in his operations for the relief of the vessel, and down to the time when she was taken into the port of St. Joseph, was acting as the representative of the insurance company. This appears outside of testimony which was objected to, such as his own statements on the subject, which I rule incompetent. He went to the scene of the wreck at the instance of the general agents of the company who designated him specially for the employment, and he was accordingly employed by the local agents in Chicago to render such assistance to the vessel as was necessary. The insurance company was interested in the rescue of the vessel, because it had issued a policy covering Ebert's interest; and all parties seem to have co-operated in the service, for the purpose of protecting from loss the interests of the respective parties, including that of the libellant, Kirby.

It seems to me, also, that after Crosby & Dimick received from Fitzgerald & Co. the notice of abandonment sent in the form of a telegram by Ebert, on November 6th, the insurance company might very properly, so far as Ebert's interest was concerned, assert the right to look after and protect that interest. Whether it was a technical abandonment, under an absolute right to abandon, is doubtful. The policy provided that the insured should not have a right to abandon, unless the amount which the insurer would be liable to pay under an adjustment as of a partial loss should exceed half the amount insured; nor was any abandonment to be valid unless it should be efficient to convey to and vest in the insurance company an unincumbered and perfect title to the subject aban-

doned; and the facts bearing upon these conditions in the policy, and which affected the right to abandon, were not then ascertained.

I regard it extremely doubtful whether, under any authority Blackburn had from the insurance company, he could act for the company, so as to make it liable for the consequences of his negligence, after the vessel was brought into the port of St. Joseph. He was a wrecking master. His instructions were simply to go to the assistance of the vessel; and when he got her off the beach, and safely into port, it would seem that his authority ceased, and that, without further authority, what he might thereafter do, especially if he proposed to take the vessel in a disabled condition across the lake, would be done upon his own responsibility, so far as the company was concerned. In a case like this, where it is sought to charge one party with damages resulting from the negligence of another, it ought clearly to appear that the act out of which the alleged liability springs was within the scope of the latter's authorized employment. The company does not appear to have given Blackburn any authority to take possession of the vessel, or to do anything with her except to assist in relieving her from the immediate extremity she was in. He had no authority to accept an abandonment. He received no instructions from the company to take her out of St. Joseph harbor, or to take her to any other port for repairs. If the determination of the case turned upon this question, I should be strongly disposed to hold that after the wrecking service was completed, and the vessel brought into port, Blackburn's relation to the company, as its representative, ceased, and that in what was subsequently done he acted on his own responsibility, and rather in the capacity of an independent salvor than as the agent of the company.

Even if Blackburn were to be regarded as the company's agent, acting within the scope of his employment, down to the time the vessel was lost, it is not altogether clear that such negligence was imputable to him in attempting to take the vessel to her port of destination as would make the company liable for her loss. If he acted in good faith, but erred in his judgment as to the success of the undertaking, it might not follow that such error of judgment alone should involve his principal in a liability to damages, the same as if the loss had been occasioned by positive negligence. The law does not judge the facts in such a case with all the wisdom that comes after the event, but rather in the light of the circumstances and situation as they appeared at the time to those charged with

negligence. However this may all be, upon an attentive perusal of the testimony, and upon consideration of all the circumstances of the case, as I am enabled to judge of them in the light of the evidence, I am well convinced that the attempt to take the vessel to the port of Milwaukee was made, not alone upon the individual responsibility of Captain Blackburn, but with the consent and acquiescence, and in accordance with the expectation, of both Ebert and the master of the vessel. Although both of these parties seek to place the entire responsibility of the attempted voyage across the lake upon Blackburn, it is quite evident that they co-operated in the preparations for that voyage, and the circumstances strongly point to the conclusion that they expected and desired the vessel to be taken to the port of Milwaukee, which, as before observed, was the port of destination of both vessel and cargo. To my mind, in view of all the circumstances, it is hardly credible that Blackburn, without any interest so to do, would, of his own independent will, take the vessel across the lake. He had no instructions from the insurance company which authorized it. No fact is disclosed which would naturally prompt him to do it, in the absence of a desire and expectation on the part of the master of the vessel that it should be done.

The alleged abandonment did not transfer the managing ownership to the insurance company. If there was a valid abandonment, it was only of Ebert's interest. The other half interest owned by the libelant was unaffected by the abandonment, and the surrender by Ebert to the company of his interest did not determine the master's duty or authority, so far as the libelant's interest was concerned. He still owed allegiance to the vessel, as the representative of the libelant's interest in the existing emergency. His authority had not been countermanded or withdrawn by the libelant, who knew the vessel was in distress. The duty of the master, and his right to a voice in the control of the vessel in behalf of the libelant's interest, after she was got into port at St. Joseph, still remained: and, so far as anything here is disclosed, he could not be legally dispossessed of that right by Blackburn; nor could Ebert, by any directions to master after the alleged abandonment, legally authorize or instruct him to abdicate his functions as master in favor of Blackburn, so far as the libelant's interest was concerned.

As I have said, the circumstances tend strongly to prove the concurrence of the master in the proposal to take the vessel to Milwaukee. It was for his interest and the interest of the party he represented, that this should be done. He says everything was

done under the directions of Blackburn and that the vessel was not fit to cross the lake, and yet he made not the slightest objection to the voyage. He undoubtedly expected that the vessel would be taken to her home port; and, indeed, he says in his testimony that when they were sheathing her with the sail, and putting part of her deck load again on board, he knew she was going across the lake. His statement, in another connection, is: "I knew she was not going to stay there, because she could not be rebuilt there; or perhaps she could, but it cost a good deal more." When asked when he first learned the vessel was to be taken out of St. Joseph, he seems to repeatedly evade the question, and says he was at supper when he first learned "the particular place to which she was bound." Finally he says: "I always had an idea she would be taken to Milwaukee," and that he understood that when she was got off the beach, she was to be taken there. He and the crew assisted in the work done preparatory to the voyage, and it is not reasonable to suppose, if he thought the vessel "was not fit to cross the lake," that he, with his entire crew, would have gone aboard, without objection, to make the voyage. In his examination these questions are asked, and answers given:—

Question. You didn't know anything about it then [referring to the proposed voyage across the lake], when you put the light lumber in her during that afternoon? *Answer.* Well, I knew that they would not rebuild her in St. Joseph; but I didn't know exactly where she was going, because I didn't ask. *Q.* Then, you knew all the time that she was not to be repaired at St. Joe. but was to be taken across the lake to be repaired? Was that it? *A.* Well, I thought she would have some repairs, but I knew she was not going to be rebuilt there.

That the master deferred to Blackburn's judgment is highly probable, but that he surrendered his position as master, and also the uninsured interest of the libellant in the vessel, seems to me very improbable. On the contrary, various out-croppings in the testimony, and the circumstances of the affair, lead me to think that he concurred and assisted, not alone in the efforts made to release the vessel from her extremity, but in all the preparations to take her across the lake, without objection or dissent, and that he so acquiesced, in the belief and with the understanding that he was thereby promoting the interest of the libellant, whom he still represented.

It also appears that Ebert was more or less active in the preparations which preceded the attempt to cross the lake. He placed the sail under the vessel, put the hoistings inside the canvas, remained

with or near the vessel while the work was in progress, and saw her leave St. Joseph without dissent or objection. He claims that before rendering assistance he asked Blackburn if he should do so, which, under the circumstances, seems very improbable. He says that the day Blackburn came to the relief of the vessel he told him to take her to Milwaukee, and that he thought if they could get her right off "it would not hurt to take her." The cargo belonged to his father-in-law, was consigned to Milwaukee, and he made no objection to so much of it as was carried remaining on board. The testimony also shows that he expended money to pay wages of seamen earned, and bills incurred after the abandonment of his interest, and I cannot resist the conclusion that all the parties contributed their best endeavors—First, to get the vessel out of her extremity, and then, to take her, with part of her cargo, to Milwaukee, her port of destination. If an error of judgment was committed, it was a mutual error. If there was negligence, it was negligence in which all shared. The master was the legal representative of the uninsured interest, participating in and consenting to the venture; and so I am of the opinion that the loss which resulted ought not to be visited upon the respondent, especially when the authority of Blackburn to employ the vessel in navigation, even for the purpose of taking her to her home port, is not clear.

The testimony of Blackburn is in direct antagonism to that of Ebert and Captain Starke, and although various particulars in which he is corroborated by the circumstances might be pointed out, I do not deem it necessary to extend discussion of the subject. At best, the right which the libellant asserts against the respondent is doubtful. A clear case of liability is not, in my opinion, established, and the libel must therefore be dismissed.

EFFECT OF DISHONORED DRAFT FOR DUES.

Marion County, Ind., Superior Court.

JANE CLINE

vs.

NATIONAL BENEFIT ASSOCIATION.

Orders drawn on the paymaster of a railroad were given and accepted for the premiums. At the bottom of the orders was written: "If this order is not paid then all my rights in said association are thereby forfeited." Payment of the order was refused by the paymaster and afterwards by the insured.

Held, That the acceptance of the order operated as a payment where the certificate acknowledged payment, and recited that it should be incontestable.

Held, That though the stipulation on the order might result in forfeiting any rights of the applicant, it did not affect the right to recover of a beneficiary in whom such right had become vested through the issue of the certificate.

Howe, J.

There was evidence in this case tending to show the following facts :—

On July 24, 1882, one Nick Cline made application to defendant for a certificate of membership. The application, a copy of which is written upon the reverse side of the certificate, contains the following clause: "I hereby agree to pay on becoming a member the following admission fee—\$8.00, dues; six assessments of \$1.60 each = \$9.60; total \$17.60. I have received for the above binding receipt No. 6,337. N. B.—If the number of a binding receipt is inserted it becomes conclusive evidence that the above amount has been paid, if no number of 'binding receipt' is inserted, the payment is to be made upon the delivery of the certificate." The \$17.60 made up of the amount above specified constituted what is called

the "first payment," viz., the advance payment required before the issue of the certificate.

Thereupon a certificate was issued, purporting upon its face to be "in consideration * * * of the admission fee of eight and of nine and $\frac{6}{10}$ dollars, being for six advance assessments paid, the receipt above of which is hereby acknowledged, etc." It further recites that "the sum represented by this certificate of membership is not to exceed one thousand dollars, to be paid to Jane Cline or his (her) legal representatives in the event of the death of said Nick Cline. And that if he should sustain bodily injuries of a kind specified, disabling him from the prosecution of business, then he should be indemnified against loss of time at a certain rate per week. At the bottom of the certificate is printed in red ink, and in conspicuous type, the following: "This certificate shall be incontestable for any cause except fraud or misrepresentation in the application or proofs of loss, or failure to report to the association any change of occupation that would make the risk a more hazardous one, or failure to comply with the conditions above specified." At the same time a "binding receipt," numbered 6,337, was given to the applicant, wherein the defendant acknowledged his receipt of the first payment of \$17.60.

The applicant Cline did not pay the first payment in cash, but gave some orders for the amount thereof, drawn upon the paymaster of a railroad company for which he was working and made payable out of his monthly wages. At the bottom of one of these was written the following: "If this order is not paid, then all my rights in said association are thereby forfeited." This order was not paid by the paymaster, and afterward, on being presented to Cline, he likewise refused to pay it. Shortly after that he was accidentally killed.

It is conceded that the plaintiff, who is this Jane Cline named in the certificate, has a right to recover unless her rights under such certificate were forfeited by reason of the non-payment of the order.

The foregoing statement of the evidence is as liberal to the defendant as it can reasonably claim.

The trial at special term resulted in a verdict and judgment against the plaintiff, and she appeals. The question presented by her appeal having been properly saved.

That the orders given were given and received in full payment of the advance sums required to be paid for the issue of the certificate, there can be no doubt. It is not a case where the fact being that the first payment required was not made, the defendant is neverthe-

less estopped to set up such fact in defense, although there is authority for applying such an estoppel in favor of the plaintiff. Even if such were the fact, as will be seen by the authorities hereinafter cited. Here the undisputed fact is that the orders were received in full payment of the amount required to be paid before the issue of the certificate. Anything is to be deemed payment which is given by the debtor and received by the creditor as such. If a non-negotiable note or order be given by the debtor it may be that the prima facie presumption would be that it was given and received as conditional payment only, to operate as payment only in the event of the payment of each note or order. But such presumption would be overcome by proofs that the agreement of the parties was that such note or order should be received as absolute payment. If such is the agreement of the parties then the debt for which such note or order was given is paid and discharged, whether the note or order be paid or not, and the creditor is left to such remedies as the laws may allow him for the non-payment of such note or order.

That is the case here presented. In the most unequivocal language in the application, the certificate, and the binding receipt, the defendant has admitted that the amount required for the first payment has been paid, and that it will not contest the validity of the certificate upon the ground of the non-payment of such amount.

The debtor, if any, in this case, is not in regard to the propositions of law above stated, but in regard to the effect of the clause in the order in relation to its non-payment. In considering the effect of this clause there is an important fact to be borne in mind which I think was overlooked in the trial at special term, viz., that there are two beneficiaries with separate and distinct rights in the certificate sued on. Jane Cline, the plaintiff, was one of them, and she alone was entitled to the \$1,000 stipulated to be paid upon the death of Nick Cline. The applicant Nick Cline was a beneficiary, having no right to or interest in the \$1,000 stipulated to be paid to Jane Cline, but having the sole right to the weekly benefits stipulated to be paid to him upon the contingencies therein named. The plaintiff, as to the \$1,000 stipulated to be paid to her, stands in precisely the same relation to the applicant and the defendant as she would if a separate certificate had been issued to the applicant for her benefit, in which event it would have been regarded as her separate property from the date of its issue, entitling her to the proceeds realized upon it, and Nick Cline would have had no power to assign or surrender it without her consent: *Wilburn vs. Wilburn*, 83 Ind., 55. See also

Harley vs. Heist, 86 id., 196; Damron vs. Penn Mut. Ins. Co., 99 Ind., 478.

I refer to the distinction between the rights of the plaintiff and the rights of the applicant to show that it does not, by any means, follow, that because the right of the applicant may have been forfeited by the non-payment of the order, the rights of the plaintiff were likewise forfeited by such non-payment. Forfeitures are not favored, as has often been said, especially in cases of this character, and none should be adjudged against the plaintiff unless the contract clearly authorizes it.

In neither the application nor the certificate is there the slightest intimation that the non-payment of the order will operate as a forfeiture of plaintiff's right to the \$1,000 stipulated to be paid to her. Indeed there is in them no reference whatever to the order. It is only in the order itself that the clause occurs upon which the defense is based. The clause is that wherein Nick Cline stipulated that "If this order is not paid, then all my rights in said certificate are thereby forfeited." What effect this clause would have upon the rights of Nick Cline himself, if he was living and was suing for himself to recover weekly benefits under the certificate, it is not necessary to decide. This is not such a suit. It is a suit by the plaintiff to recover the sum agreed to be paid to her in the event of the death of the applicant.

Neither is it necessary to decide that the effect would have been upon the rights of the plaintiff if the clause in question had provided that upon non-payment of the order all her rights in the certificate would thereby be forfeited. I will say, however, that even if such was the case, there would be strong reasons for holding the defendant to be estopped from setting up the defense of non-payment of the order. The order was, of course, delivered to the defendant, and it is not to be presumed that the plaintiff ever saw it or knew anything of the clause in it in regard to the effect of its non-payment. If she had known of it she might have preserved her rights by seeing to its payment. The certificate, a copy of the application written upon the back of it and the binding receipt, were all that were delivered to the applicant and all that the plaintiff can be supposed to have known about. These in the plainest and most unqualified terms admitted the first payment and bound the defendant not to contest the validity of the certificate upon the ground that the first payment had not been made. The defendant now seeks to deny that it solemnly admitted to be true, to contest the

certificate which it assured the plaintiff would be incontestable for any reasons now urged, and to release itself from a receipt which it promised her should binding. I do not see that a clause could have been devised better calculated to turn plaintiff off her guard, or that stronger ground could be presented for holding the defendant to be estopped to set up the defense of non-payment of the order, even if it had contained a provision providing for a forfeiture of plaintiff's rights in the event of its non payment. See *Biglow Estoppel* (3d Ed.), 321, note.

But it is not necessary that I should base my opinion upon the ground of estoppel, because the order contains no provision in relation to a forfeiture of the plaintiff's rights in the certificate. By its express terms the non-payment of it forfeits only the rights of Nick Cline, the applicant. In it he stipulated that if the order is not paid, then all his rights in the association should be forfeited, but there is nothing in the language used showing that it was intended that the rights of the plaintiff also should be forfeited. If that had been the intention it should have been so said in plain words, especially in lieu of the language of the application and certificate.

We must, then, look to the other parts of the contract, the application, the certificate, and the binding receipt, to see whether the plaintiff's rights have been forfeited by reason of the non-payment of the order. As I have already said, these do not even mention the order, but admit in the plainest and most unqualified terms the payment of the sum required for the first payment and bind the defendant not to set up the non-payment thereof as a defense to the certificate, that the defendant ought not to be permitted under such circumstances to set up any such defense against the plaintiff is a proposition so plain in law and morals that authority is not necessary to support it. But it happens that there is a case almost precisely in point. I refer to *National Benefit Association vs. Jackson*, decided by the Supreme Court of Illinois, September 23, 1885, and reported in full in 1 *Western Reporter*, 600. That was an action by a beneficiary against the association which is defendant here, upon a certificate and application of exactly the same kind as that in question here. An order had been given, there as here by the applicant, who was a railroad employe, upon the paymaster of the railroad company for the amount of the first payment. The order had not been paid and its non-payment was set up as a defense. To make the resemblance between the two cases more complete, it

appears that the learned counsel for the defendant here was also counsel for the defendant in the Illinois case. In fact the only substantial difference between the two cases is that in the order given in the Illinois case there was not, so far as appears in the report, any clause providing that the non-payment of it should forfeit the rights of the applicant. But this, as I have endeavored to show, does not affect the rights of the plaintiff, which must be determined, as in the Illinois case, from the language of the application, certificate, and binding receipt. The Supreme Court of Illinois held that the defense set up was not well taken.

I think that in the second instruction given by the special term in distinction between the rights of the plaintiff and the rights of the applicant was overlooked, and that the verdict was not sustained by the evidence.

Judgment reversed, with directions to the special term to sustain plaintiff's motion for a new trial.

Taylor J., dissents.

CHANGE OF PLACE OF STORAGE.

Allen County, Ohio, Circuit Court.—Error to the Court of Common Pleas of Allen County.

THE PHOENIX FIRE INSURANCE CO.

vs.

CHARLOTTE N. VORHIS.

Where personal property is described in a policy of insurance as being situate in a particular building, and such place of storage is afterward changed without the consent of the insurer, and loss accrues, no recovery can be had.

Where the assured notified the company that she would change the place of storage, and was informed that the assent of the company to such change, when made, must be entered upon the policy of insurance, and nothing further is done by the assured, either notifying the company of the change made or procuring its assent, such notice is not sufficient to bind the company.

RICHE & RICHIE, for Plaintiff in Error.

T. E. & W. H. CUNNINGHAM, for Defendant in Error.

MOORE, J.

The plaintiff, Charlotte N. Vorhis, filed her petition in the Court of Common Pleas of Allen County upon a policy of insurance issued to her by the Phoenix Fire Insurance Company, to recover the sum of \$100, being the amount of insurance upon a buggy, which was included in said policy of insurance with other personal property named therein. The buggy was described in said policy in these words: "\$100 on her buggy, situate in a frame shed on Walnut Alley, between North and High Streets, in Lima, Ohio." The petition contained other necessary averments of proof of loss, etc.

The insurance company filed its answer, setting forth the fact, that without its knowledge or permission the plaintiff had removed

said buggy from the place designated in said policy of insurance, to another and different place of storage, when not in use; to wit, to the livery stable of one Robert Hume; and that said buggy was burned in said stable, and not at the place where it was insured; and for that reason it denied its liability for said loss. No other defense was made.

The plaintiff, by her reply, admitted that the buggy had been removed to Hume's livery stable, and that it was therein burned; but she averred that the insurance company had been notified of the removal of the buggy to the livery stable, and had assented thereto.

The cause was submitted to a jury, and under the charge of the court, a verdict was returned for the plaintiff for the amount of the insurance.

The defendant filed its motion to set aside the verdict and for a new trial, for the following reasons, to wit: First, that the verdict was not warranted by the testimony.

Second, that the court erred in its instruction to the jury.

This motion the court of common pleas overruled, and entered judgment on the verdict.

The Phoenix Insurance Company filed its petition in error against the plaintiff below, Charlotte N. Vorhis, in this court, and asks the reversal of the judgment of the court of common pleas, on the ground of the refusal by that court to set aside the verdict of the jury and grant a new trial for the reasons set forth in the company's motion filed for the purpose.

The testimony and charge of the court are before this court in the bill of exceptions.

The testimony establishes the following facts, to wit:—

That Ambrose Vorhis, acting as the agent of the plaintiff, his wife, some two months before the fire called at the office of Melhorn, the agent of the insurance company, and said to the agent that his wife intended to remove her property. Mr. Melhorn told Mr. Vorhis, that in order to keep the insurance valid it must be transferred upon the policy. Nothing was said by either party about the buggy, the word property alone being used. Mr. Vorhis did not state to Melhorn where his wife intended to remove the property to. This was all the notice or knowledge the company had concerning the intended removal, and it did not in fact know that the property, or any part of it, had been removed, or where it was removed to until after the fire which consumed the buggy. Within a few days of the

conversation between Vorhis and Melhorn, Mrs. Vorhis removed the buggy to the livery stable of Robert Hume, where it was afterward burned. After the fire, Mr. Melhorn, the agent for the insurance company, was notified for the first time that the buggy had been removed, and of the place to which it had been so removed.

Mr. Vorhis further testified, that after the buggy was removed he went to the office of Mr. Melhorn, the company's agent, to have the transfer made on the policy; but Mr. Melhorn was not in, and he did not see Mr. Melhorn until after the loss. This is not contradicted by the testimony.

The liability of the defendant below upon these facts is the only question before the court for its determination, every other essential fact necessary to a recovery being admitted. No change in the terms of the contract other than the change in the place of the storage was asked for, or claimed to have been assented to, nor any other change made by the assured which could affect the liability of the insurer.

There is no claim made on the part of the assured that the insurer had any knowledge as to the place to which the buggy was to be removed for storage, and no knowledge that it in fact had been removed. All that can be claimed by any fair construction of the evidence is, that while the assured said to the insurer that she intended to remove her property, and was informed that consent of the company must be entered on the policy to keep the insurance in force, the company was not informed of the time of removal, or the place to which the buggy had been removed; and had no opportunity to either advance rates, cancel the policy, or assent to the continuance of the risk upon the terms of the policy.

The description of the place where personal property is insured, is a warranty that it is then in that place, and that it will remain there. This rule is based on sound reason, and is consistent with the rule which controls in the construction of all other contracts; and no reason is apparent why a different rule should be applied to the construction of policies of insurance.

At the time of making the contract by the issuing of the policy by the insurer, and its acceptance by the assured, the location or situation of the property is considered by the insurer in fixing the rate of insurance; and it is for the risk assumed by the insurer in that place that the assured pays. To hold that when the insurer has assumed the risk of loss by fire in a locality with which it is familiar, for a certain consideration, that the assured may, at his

option, place the property in another place where the hazard may be doubled or trebled, without the assent of the insurer, or an opportunity to protect itself by increasing the rate, or canceling the policy, would be to permit the assured to impose upon an insurance company, without its assent, burdens for which it received no consideration, and which could be done under no other class of contracts.

The insured should not be held for a loss unless it is fairly within the terms of the policy, and in determining what is within the terms of a policy, the character of the goods insured must be considered; for if it is of such articles as are not required to be removed from the place designated in the policy, in their ordinary and proper use, no recovery can be had if burned while not in the designated place of storage, as such removal would not reasonably have been contemplated by the parties at the time of making the contract. But if a horse, buggy, or other article be insured, which in its ordinary and proper use would be taken from the designated place of storage, such removal would necessarily have been taken into account by the insurer and assured when the risk was taken, and for a loss which should occur while temporarily absent from the place of storage, while in use, the company would be held.

These conclusions are supported as well by the light of carefully considered cases, from which we cite *Bryce vs. Lorillard Ins. Co.*, 55 N. Y., 240, where goods insured were described as being in section "C" in a store, while in fact they were, at the time they were insured, and at the time of loss, in a different section, and it was held that there was a breach of warranty. Folger, J., in his opinion, says: "Whatever is expressed, whether with perspicuity or obscurity, that is what is warranted."

In *McCluer vs. Girard Ins. Co.*, 43 Iowa, 349, the court say: "Where there was insurance on a phaeton contained in a frame barn, the designation of the place was a warranty that it should be kept in the barn, except when temporarily absent for use."

We think it clear that under the facts in this case no recovery can be had for the loss, as it was not "temporarily absent for use." The verdict was not supported by the evidence, and for refusal to set the verdict aside the judgment of the court of common pleas is reversed and cause remanded.

ASSIGNMENT OF MORTGAGE IN CASE OF MORTGAGEE INSURANCE.

Chancery Court of New Jersey.

BOUNDBROOK MUT. FIRE INS. ASS'N.

vs.

EMILY A. NELSON ET AL.*

A vendor held a policy of insurance on the dwelling-house standing on the premises sold. She took a mortgage for a part of the purchase money which was in excess of the amount due on the policy. She did not assign the policy at the time of the conveyance nor until after the house was burned; the company tendered the amount due on the mortgage, and demanded an assignment of it, which was refused. *Held*, That the company was entitled to the mortgage. *Held*, also, that in order to carry costs, it was not necessary that the company should tender the whole amount of the unpaid purchase money.

On bill, answer, and proofs.

Messrs. GASTON and BERGEN, *for Complainant*.

Mr. R. V. LINDABERY and J. D. BARTINE, *for Defendants*.

BIRD, V. C.

Mrs. N. was the owner of a tract of land. The dwelling-house thereon was insured in the complainant's company for twelve hundred dollars. December 17, 1884, she sold and conveyed the premises to her sons George and Albert, by deed with full covenants of warranty. At the same time the sons executed to her a purchase-money mortgage for \$1,500, being one-half of the consideration money. The deed was placed in the clerk's office for record imme-

* Decision rendered, September, 1886.

diately after its execution and delivery. The mortgage was executed by Albert and wife and by George, but not by George's wife, she not being present. There is some dispute as to the precise disposition of the mortgage after it was so executed; the defendants claiming that it was delivered to Albert to be retained by him until George's wife could be produced to join in the execution of the mortgage and until George could raise a small portion of the consideration money to be paid by him. I do not think there is any room for doubt on this branch of the case, without hesitation I find that the mortgage was delivered to Mrs. N. In her proof of loss she swears that she took such mortgage as part of the consideration. Having been delivered to her the transaction was complete. She being the mortgagee, she could not hold it in escrow. The mortgage having been given for a part of the purchase money it was not essential that the wife of the mortgagor should join in its execution.

An effort was made to sustain this branch of the defense by showing that the consideration money was not all paid by the one son or the other and that the parties intended to suspend its completion until such payment could be made. But the conduct of the parties, their relations to each other at the time and before the delivery of the deed very satisfactorily proves that what they did was complete in itself, and that, for what remained to be done there was the same implicit confidence that it would be done as had been exhibited before between them. For example, the mother was indebted to the one for about \$750, and the other about \$250, without security to either. These claims were canceled or intended to be at the time of the transaction. The testimony is that Albert gave up his note at the time. George says that the exact amount due him from his mother was \$239, and that she was to give him a note for it, but never did. He says that was to go as part payment on the farm, and the balance he was to pay his mother. I repeat that to my mind it seems clear that in the law the transaction was complete between the parties.

The deed and mortgage were delivered on the 17th of December, 1884, the house was burned on the twenty-fifth of that same month. At that time Mrs. N. held both the mortgage and the policy of insurance. The complainants admit that she had an insurable interest in the premises to the extent of the unpaid purchase money and from the time of proof of loss have been willing to pay her the amount of the policy.

The complainant tendered to her the amount of money due upon the policy and demanded of her an assignment of her interest in the mortgage to that extent, but she refused to make such an assignment. Upon such refusal, the company tendered to her the amount due upon the policy with such additional amount as represented the balance due upon the mortgage and demanded an assignment of her interest in the bond and mortgage, which Mrs. N. also refused.

Was Mrs. N. justified in this refusal? in other words had the company a right, upon payment of the amount due according to the proof of loss upon the policy and the additional amount between that sum and the amount due upon the mortgage, to stand in her place. Independent of the rights of others there seems to be no doubt of their right to subrogation.

Sussex Co. Mutual Fire Ins. Co. vs. Woodruff, 2 Dutch., 541; *Springfield Ins. Co. vs. Allen*, 43 N. Y., 389; 17 N. Y., 428; 16 Ward., 385; 13 Wal., U. S., 367; 70 N. J., 19.

But it is said in this case that the rights of the sons in equity prevent the application of the doctrine of subrogation. The claim is that the sons have the right to stand in the place of the mother and not the company; and that although they did not have the policy assigned and transferred to themselves and have such assignment approved, they intended to do so. The testimony leads me to the conclusion that so far as there was any intention on the part of the sons to have the policy transferred to them and then retransferred to their mother as collateral security, it was but a faint or uncertain intention. If there was any intention whatever, it was not so followed up or prosecuted as to justify the court in aiding the defendants, George and Albert. It may well be said that it is the duty of the court to aid those who otherwise suffer when an accident intervenes and prevents them from the accomplishment of an object which they are honestly in the pursuit of diligently. But with honest intentions there must be diligence; otherwise the court will frequently aid in the commission of the greatest injustice; otherwise, it will only be necessary, in such cases, for parties to say, "we will complete or execute the transfers by and by or at some other time," and be perfectly safe, because under the protection of the court. The doctrine contended for is salutary, but the company against whom it is sought to be applied is certainly entitled to protection from laches.

In this case there were no steps taken by the sons, until after the house was burned, to have the policy transferred and such transfer

approved. One of the by-laws of the company is that "no transfer of any policy of insurance of the said company shall be valid until approved by an insurance committee, and certified by the secretary on the policy; in all cases of transfer new notes shall be given." These requirements were in no sense complied with and not a single step taken to show an honest and bona fide intention to comply with them. When the deed and mortgage were executed and delivered, the parties were, with their counsel, at the county seat of the county in which the complainant's company is established and has always had its offices. It seems to me that while it is competent for the court to listen to the sworn statements of parties in such cases, that it was their intention to do this or that, unless such intention is manifested and supported by some act done, with all due diligence, the chances that the court will do injustice will greatly preponderate, if it be governed by such declarations. Hence I conclude that this defense, in behalf of the sons, also fails.

My attention was called to the doctrine of subrogation as laid down in *Wood on Fire Insurance*. After a careful examination of Wood's exposition of the law and of the cases on which he rests his conclusions, I find myself unable to place these parties within either the one or the other.

Again it was urged that the complainant, in case it was otherwise entitled to recover, was not entitled to costs as against Mrs. N., for the reason that it did not tender to her the whole amount due to her. The claim is that the amount of the mortgage and also the difference between \$239.00 and the interest thereon for a short time, and \$750 (being the whole balance of the purchase money unpaid and unsecured) should have been tendered.

As I understand the evidence, Mrs. N. made her claim for the benefit of the insurance because she held the mortgage, and not because of any vendor's lien.

Making her claim on this ground, she could not expect the company to treat or deal with her on any other ground. She might perhaps refuse to accept only a portion of her security. But it is certainly different when we consider her rights under the law respecting vendor's lien, when applied to this case. Not that there would be any difference between the rights of a mortgagee and a vendor (which I am not discussing); but in this case Mrs. N. has herself done an act which I think prevents her from insisting that she shall not pay costs. That act was the taking of mortgage for a portion of the unpaid purchase money, which in this case was in

excess of the amount due on the policy. In so doing she had divided her lien or claim. She is now no worse off in any sense than she then was. If it was her intention to retain her lien as vendor, she still has it, notwithstanding the court may order the assignment of the mortgage to the complainant.

I think the complainant is entitled to a decree with costs, as against all of the defendants.

VACANCY NOT EXCUSED BY DILIGENCE.

Appellate Court, Fourth District, Illinois.

NIAGARA FIRE INS. CO.

vs.

FRANK DRDA.*

Where a policy of insurance contained the condition that if the building should be or become vacant or unoccupied for the purpose indicated, as a dwelling-house, the policy should become void unless consent was given by the underwriters, it was error for the court to make the liability dependent upon the diligence of the assured to keep the building occupied. Such qualification was not contained in the policy.

Action upon a policy of insurance issued by appellant to appellee, insuring his dwelling-house, then in the possession of one Ritynger as tenant. The policy contained the condition that "if the building therein described became vacant and unoccupied for the purposes indicated in the contract, the policy should become void, unless consent of the company is indorsed in writing by the company." The house was totally destroyed by fire, and upon the trial below to recover for such loss, the only question made was, whether at the time of the fire the building was vacant and unoccupied within the meaning of this condition in the policy. A few days before the fire the appellee served a written notice upon his tenant to vacate the house and surrender the possession to him. The evidence on the part of the appellant tends to show that Ritynger moved out of the house some two days before the fire occurred, while that of the appellee tends to prove that he was at the house on the evening of the night that the house burned, and that the appellee had made arrangements for another tenant to move in after the former one had moved out. Under the issue presented and the evidence bear-

* Opinion filed, June 12, 1886.—From 19 Bradwell R.

ing thereon, the appellant asked the court to give to the jury three instructions, the first only of which it is necessary to notice, as the modification of that one by the court presents the point made and argued. It was as follows: "The court instructs the jury, that if they believe from the evidence that the policy of the insurance upon which suit is brought in this case, contains a condition that if the building described therein should become vacant or unoccupied for the purpose indicated in said policy, unless consent in writing was indorsed by the company thereon, that then the said policy should become void, and if the jury further believe from the evidence that the building insured under said policy was destroyed by fire, and at the time of such destruction was vacant and unoccupied, without the consent of the company in writing indorsed on said policy, then the said policy was void, and the plaintiff is not entitled to recover." The court modified said instruction by adding thereto, after the words "vacant and unoccupied," the following: "by the negligence or fault of plaintiff or his agents or servants," and so qualified gave it to the jury. The jury returned a verdict for the plaintiff, upon which the court rendered the judgment, and the defendant appealed.

Messrs. KROME & HADLEY, for Appellant.

Messrs. BURROUGHS & WARNOCK, for Appellee.

PILLSBURY, P. J.

The condition in the policy that if the building should be or become vacant or unoccupied for the purpose indicated, as a dwelling-house, the policy should become void unless the underwriters indorse their consent upon the contract, seems absolute, not in any way or manner dependent upon the diligence of the assured to keep the building occupied. It is a stipulation that the parties had a right to make, and no improper means being employed to induce the appellee to enter into it, the courts should enforce it as made and should attach no qualifications thereto not contemplated by the parties. The underwriter did not desire to carry the risk except when the building was occupied as a dwelling-house, and stipulated to that effect, which was agreed to by appellee. While it was vacant and unoccupied the risk was that of the appellee, unless he should obtain the consent of the company in writing, and if he could not do so he could obtain insurance upon it as vacant property. Without notifying the company and obtaining its consent to carry the risk, he cannot claim exemption from the effect of the condition because he had used reasonable efforts to rent it to other tenants.

The binding effect of this condition did not depend upon the fact that he had used his best endeavors to keep the building occupied, but whether he had kept it occupied. Nothing is shown from which it can be inferred that it was impossible for him to comply with the condition or get the consent of the company in case his tenant removed. Under the ruling of the court the plaintiff would be bound to recover even if the building was in fact vacant and unoccupied, provided the appellee was not guilty of negligence in permitting it to so become and remain, whether it is so continued for one day, a month, or year. With the hardship that the condition may impose upon appellee in this case we have nothing to do; and although we may doubt the wisdom or propriety of parties paying their money for indemnity under such strict conditions, yet as a court we have no right or power to add to or take from their contract any conditions or qualifications they have seen proper voluntarily to omit or insert. The construction of the policy is for the court, and the question of fact presented by this record is whether the building was vacant and unoccupied for the purpose named in the contract at the time it was burned, and we do not desire to express any opinion upon the weight of the evidence at this time, as for the reason stated, the case must be again tried at the circuit. As bearing upon the question discussed, we refer to the *Hartford Ins. Co. vs. Webster*, 69 Ill., 392; *Cook vs. Continental Ins. Co.*, 70 Mo., 610; *McClure vs. Watertown Ins. Co.*, 90 Penn. St., 277, and the recent case of *Farmers' Ins. Co. vs. Wells*, decided by the Supreme Court of Ohio, January 20, 1885, and not yet reported. The error urged, that the court refused to allow the appellant to prove the statements of the son of appellee as to the time the house was unoccupied, we consider not well taken, as it does not appear that he sustained that relation to the plaintiff which would render his admissions competent. The proofs of loss, which were never shown to the appellant, containing a statement of when the tenant left the premises, and signed by the plaintiff and delivered to the appellant upon the trial and offered in evidence, we think should be allowed to go to the jury. It is true the statement was never delivered to the appellant, but as it was designed to be delivered, and contained an admission of the plaintiff as to a material fact in the case, the jury should have been permitted to consider it in connection with the other evidence in the case.

For the error indicated the judgment will be reversed and the cause remanded.

Judgment reversed.

MISREPRESENTATION AS TO USE OF BUILDING.

Supreme Court, Marion County, Indiana.

DORAS J. BAKER.

vs.

GERMAN FIRE INSURANCE COMPANY OF PITTSBURGH.*

A building used in part for a saloon, a resort for prostitutes and where no rooms were set apart for lodgers, is not a hotel.

Statement.

This action was brought by plaintiff against the defendant on a policy of fire insurance to recover for a loss. The complaint alleges that defendant contracted to insure plaintiff's property against loss by fire, described as a two-story, frame, shingled-roofed building and all attachments thereto, with brick basement, occupied as a hotel with bar and billiard-room attached, situated in Mount Jackson, a suburb of the city of Indianapolis.

On the 24th day of August, 1884, the said building and property so covered by said insurance, was totally destroyed by fire. Notice of loss was given four days thereafter, and proofs of loss filed on the 12th day of December following. Plaintiff further alleged due performance of all the conditions of the contract, and complained of the failure and refusal of defendant to pay the loss.

The defendant answered, alleging that the policy was issued to plaintiff at his special request, and with full reliance upon the truth of the representations at the time made. That the property was represented to be used for legitimate hotel and lodging purposes, and that the risk was first-class in every respect. Further, that the

* Decided June 12, 1886.

agent made diligent inquiry of plaintiff in regard to certain reports about disreputable dances and gatherings which were frequently held at Mount Jackson, where said property was situated, and that plaintiff denied that this was the place referred to in said newspaper article, and—

As a further breach of the warranty said property was not used as a hotel, but was used and occupied by one William Zelking, as a saloon, for the purpose of the sale of liquor, etc., and that said property was the place referred to in said newspaper reports as the place of holding said disreputable dances and gatherings which were known and concealed from defendant.

It was in evidence upon the trial that other insurance companies previously carrying risks upon the property immediately after reading certain newspaper reports of said gatherings investigated the same, and thereupon canceled their policies and communicated to plaintiff their reasons for doing so.

The jury returned a special finding, answering a number of interrogatories to the effect that a saloon was carried on in the building; that it contained billiard and wine rooms; that a gun club occupied one room; that no rooms were specially set apart for lodging, and that it was a resort for prostitutes and disreputable and lewd men.

The verdict was for the defendant, and judgment was entered thereon.

EVIDENCE OF FRAUD ON OVERVALUATION.

Cincinnati, O., Superior Court.—General Term.

HOWARD FERRIS, ASSIGNEE OF G. A. W. PAVER,

vs.

KENTON INS. CO.*

A finding of damages trifling in comparison with the amount claimed is in the absence of explanation a proof of fraud.

Reserved from special term on motion for new trial.

COWAN & FERRIS, *for Plaintiff.*

WILLIAMS & WAMBAUGH, and CLEMENT BATES, *for Defendants.*

FORCE, J.

The action is to recover upon a policy of fire insurance for \$1,000, upon a stock of goods in a store. The fifth defense is upon a condition in the policy that any fraud or attempt to defraud will forfeit any right to recovery.

The jury found for the plaintiff and found the loss to be \$600. Paver, in his affidavit of loss for preliminary proof, stated the loss to be \$1,528.36. It has been held that when the jury finds for the plaintiff, and finds the loss to be less than one-half the amount sworn to in the preliminary proof, such finding is proof of fraud, and the verdict must be set aside: *Levy vs. Baillie*, 7 Bing., 349; *Wall vs. Howard Ins. Co.*, 51 Maine, 32; *Sleeper vs. New Hampshire Ins. Co.*, 56 N. H., 401. We suppose the rule to be, that in the absence of satisfactory explanation in the evidence, such finding is proof of fraud.

In this case no explanation was attempted. On the contrary, it

* Decision rendered, June, 1886.

appears that the affidavit of loss in the preliminary proof was compiled from Paver's bills of purchase, containing the same items in the same consecutive order. But in the affidavit a large proportion of the items are overstated, some in quantity, some in value. As the evidence stands, it appears to be a case of deliberate and willful overstatement.

The verdict is set aside and the case remanded for new trial.

THE INSURANCE LAW JOURNAL.

VOL. XV.

DECEMBER, 1886.

No. 12

INDEX TO VOLUME XV.

ABANDONMENT.

1. **NEGLECT TO REPAIR.**—A policy of marine insurance contained this provision: "In case of loss or misfortune, it shall be lawful and necessary to and for the assured, its agents, factors, servants, and assigns to give the insurer prompt notice of the disaster, and submit the plan adopted for recovering and saving the property, and to make all reasonable exertion in and about the defense, safeguard, and recovery of the said vessel, or any part thereof, without prejudice to this insurance; and after recovery, and the holding of a survey by persons chosen by the insurer and insured, or their agents, made under oath, setting forth the particulars of actual damage received by the vessel in the disaster, and discriminating between those and former defects and wear and tear, the insured are to cause the same to be forthwith repaired, in accordance with the surveyor's specifications; and in case of neglect or refusal on the part of the insured, its agents or assigns, to adopt prompt and efficient measures for the safeguard and recovery thereof, or to repair the same when recovered, then the said insurers may, and are hereby authorized to, interpose and recover the said vessel, or, after recovery, to cause the same to be repaired, or both, for account of the assured." *Held*, That in an action against the insurer the neglect of the defendant to cause the repairs to be made was evidence upon which the jury are at liberty to find an acceptance by the defendant of the abandonment; the facts being that after a disaster the assured had left the vessel stranded, and after having had it surveyed notified the insurers of their having abandoned it, whereupon the insurers, after neglecting said vessel for several months, towed it into port, and, without repairing, left it there. *Northwestern Transportation Co. vs. Thames & Mersey Ins. Co.*, 641.
2. **RIGHTS OF PART OWNER—NEGLIGENCE—AUTHORITY OF WHORING MASTER.**—Where an insurer has insured the interest of a half owner of a vessel; and the vessel was stranded during a voyage; and such half owner requests the insurer to render her assistance; and the insurer sends an

VOL. XV.—54.

agent to the vessel with instructions "to render such assistance as is necessary," and such half owner notifies the insurer that he abandons his interest in the vessel to the insurer; and such agent, with the aid of the master, crew, and such half owner, move the disabled vessel to a harbor; and afterwards, without further orders from the insurer, such agent, the master, and crew, with the aid of such part owner, attempt to navigate the vessel to her home port, which is also her port of destination; and during the voyage the vessel is lost: *Held*, that the insurer is not liable to the owner of the uninsured half interest in the vessel for her loss, and is not, as to him, chargeable with negligence.

Where a policy of insurance on the interest of a part owner of a vessel provides that the insured shall not have a right to abandon unless the amount which the insurer would be liable to pay under an adjustment as of a partial loss, would exceed half the amount insured, nor unless the insurer would receive a perfect title to the subject abandoned. *Intimated*, that a notice of abandonment by the insured to the insurer, before the facts which affect the right to abandonment are ascertained, does not constitute an abandonment under the policy.

Abandonment by one part owner of a stranded vessel of his interest in the vessel to the insurer of such interest does not affect the interest of other part owners, nor the master's control over the vessel, so far as their interest is concerned.

Authority by an insurer to a wrecking master to render "necessary assistance" to a stranded vessel does not confer on such agent any authority to accept an abandonment of a part owner's interest, nor authority to navigate the disabled vessel to her home port after having once moved her into a harbor.

Libellant must, to recover, clearly prove his case. *Kirby vs. Thames & Mersey Ins. Co., Limited*, 852.

See CONTRACT 1; TOTAL LOSS.

ACCIDENT.

AFFRAY—INTENTIONAL INJURY.—At common law an affray must be fighting without premeditation by a number of persons. A mere statement without further facts that complainant was injured in an affray is a conclusion which will not meet the averment that he was injured without fault on his own part.

The fact that an injury was intentionally inflicted by another, if without fault on the part of the injured, will not prevent it from being an accident within the meaning of an insurance contract. *Supreme Council vs. Garrigus*, 284.

ACTION.

1. LIMITATION—REFORMATION.—A policy of insurance contained in effect this stipulation: (1) No action shall be commenced thereon to recover for a loss thereunder until the amount thereof was ascertained by agreement or arbitration; and (2) No such action shall be maintained unless commenced within one year after the date of the fire from which the loss occurred. *Held*, That unless the assured was prevented by the action or non-action of the insurer, in the matter of ascertaining the amount of the loss, he must commence his action therefor within the time specified in the stipulation.

A demurrer to the bill for the reformation of a policy of insurance will be sustained, when it appears that by reason of the lapse of time no action can be maintained thereon for any cause, when reformed. A court will only decree the reformation of an instrument as a means of enabling a party thereto to assert or maintain some right thereunder. *Thompson, Receiver, vs. Phoenix Ins. Co.*, 66.

2. **OTHER INSURANCE AS EVIDENCE OF FRAUDULENT VALUATION—ADMISSIBILITY OF EVIDENCE.**—Where a firm are general agents for two insurance companies, and issue a policy for one of them upon an application after an examination by a sub-agent of that company, and after the expiration of that policy insure the same property in the other company, at a higher valuation and upon another application, it is competent in an action upon the last policy to show the first application and examination, although the sub-agent did not communicate the result of his examination to the general agents, as tending to rebut the charge of fraudulent overvaluation.

After the defendant has closed his case, and the plaintiff introduces a witness upon a material point, and is cross-examined, the defendant cannot contradict or impeach him as of right in respect to a statement that he had testified the same way on a former trial, and had contradicted a witness since deceased.

A new trial upon the ground of after-discovered testimony will not be granted unless—The newly discovered witness will probably testify as alleged; the evidence is material; the evidence is probably true; the party has used due diligence in discovering it; it is independent, and not merely cumulative. *Dupree vs. Virginia Home Ins. Co.*, 191.

3. **RECOVERY IN CASE OF FRAUDULENT PROOFS AND OVERVALUATION.**—The action was to recover the amount of a loss claim alleged to have been paid through fraudulent proofs and false swearing as to the extent of the loss.

Held, That when the amended complaint apparently sets out the same cause of action as the original, it will not be set aside as if the cause were different.

In the case of money obtained under false representations, recovery may be had on an implied contract to return the excess instead of on an action in tort. In such an implied contract the admission of a partner is evidence against the firm. When the suit is on such an implied contract recovery must be limited to the excess paid above the actual loss, unless it appear that the fire was chargeable to the wrongful act of the insured. *Western Assurance Co. vs. Towle, impleaded, etc.*, 241.

4. **EFFECT OF CONTRIBUTION CLAUSE ON REMOVAL.**—Where several actions removed from a State court are based upon insurance policies on the same property, upon the same application, issued at the same time and by the same agent, containing a clause for contribution, the court will order one of the causes to be transferred to the equity docket, and the other defendants to be made parties, and the pleadings in that case to be reformed according to the equity practice.

In such case the plaintiff will be enjoined from further proceedings in the other actions until a final decree in the cause so transferred. In such case an action against a resident defendant company, pending in the State court will be stayed until such final decree, and such company will be made a party to the suit so transferred. *Falls of Neuse Mfg. Co. and others vs. Georgia Home Ins. Co.*, 303.

5. **ON PAROL CONTRACT, WHEN RIGHT OF ACCRUES.**—Where the action was upon a parol contract, and the written contract was not issued until after the loss, it is not necessary to set forth in the complaint the terms of the written policy.

In the absence of any agreement requiring demand for payment to be made, or time to be allowed, a right of action arises at once upon the occurrence of a loss within the contract. *Ganser vs. Fireman's Fund Ins. Co.* 555.

6. **IN EQUITY.**—A bill in equity, brought to restrain the collection of a judgment, will be dismissed, when every question involved was litigated in the suit at law—the pleadings permitting it, and the evidence the same, except more in detail. *Continental Life Ins. Co. vs. Carrier*, 690.

See EVIDENCE; OTHER INSURANCE 2; PREMIUM 5; REINSURANCE 1, 2.

ADJACENT BUILDING.

WHAT CONSTITUTES.—A building twenty-five feet distant is not contiguous within the meaning of a policy that provides it shall be void in case the risk be increased by the erection or use of any building contiguous thereto. The language of a policy must be clear and unambiguous, and doubt must be in favor of the insured. *Olson and Another vs. St. Paul Fire & Marine Ins. Co.*, 848.

See DESCRIPTION 1, 6; RISK 1.

ADJUSTMENT. See APPORTIONMENT; CONTRIBUTION; OTHER INSURANCE 4.

AGENT.

1. **LIABILITY ON BOND OF SURETY.**—An agent's penal bond with surety conditioned that the agent shall promptly pay over moneys received, and truly perform the duties of his agency, discloses a sufficient consideration to support the undertaking of the obligee while the agency continues, and become immediately binding upon its execution and delivery. Such a bond differs from that of a guaranty of future advances which requires as its consideration an advance or credit given, and which has no binding force until such credit has been given.

Such a penal bond is not terminated by the death of the surety as to funds afterwards coming into the hands of the agent, but may be enforced against his personal representatives. But the principal impliedly stipulates that he will not retain the agent after a known breach of the guaranty, and such retention will release the surety.

The retention of such agent, who was obligated to make monthly settlements after notice of his default, releases the estate of the surety as to any subsequent default. *Rapp vs. Phoenix Ins. Co.*, 35.

2. **NOTICE TO—WAIVER BY.**—Where an insurance company, in its contract with the insured, expressly exempts itself from being bound by "any act or statement" not contained in the written application for the policy, or indorsed on the policy, notice to its agent as to anything different from what the policy and application contained will not bind the company.

The local agent of the company cannot waive any of the provisions of the policy, except by written indorsement made on the policy or on the application, when the policy provides that anything less than a distinct, specific agreement, indorsed or attached to the policy, shall not be construed as a waiver of any condition or provision of the policy. *Enos vs. Sun Ins. Co.*, 138.

3. **REPRESENTATIONS BY BEFORE CONTRACTING.**—Statements made by an insurance agent before issuing a policy cannot be used to change the contract of insurance finally made as contained in the policy. *Burnham vs. Boston Marine Ins. Co.*, 291.

4. **AS TO CANCELLATION.**—The agent to procure insurance is not an agent for purpose of cancellation. *Broadwater vs. Lion F. Ins. Co.*, 295.

5. **WHAT WILL CONSTITUTE—WAIVER AS TO ALTERATIONS.**—Where a person assumes to be the agent of an insurance company and writes an application with his name upon it as agent, and the company receives it, writes a policy upon it with the name of the assumed agent on the back, sends it to him to deliver and collect the premium, the assured (himself believing in the agency) may well consider these facts as a recognition, on the part of the company, of the agency.

The agent of an insurance company may bind the company by waiving written assent to material alterations in the property insured where the assured does not know of any restriction of the agent's authority. *Packard vs. Dorchester Mut. Fire Ins. Co.*, 475.

6. **POWER OF SOLICITING IN MUTUAL COMPANY.**—No binding contract of insurance can be made with an agent whose powers, by the rules of the company, are limited to receiving applications for insurance and forwarding them

to the company to be acted upon by its directors, who alone are authorized by its constitution and by-laws to make the contract. *Haden vs. F. & M. Ins Co.*, 497.

7. OF INSURED OR OF THE COMPANY.—The insured applied to A., an agent who had previously been carrying his assurance, for insurance. A., who knew the condition of the property, being unwilling to carry the whole amount, procured a part from S., the general agent of another company, and sent the policy countersigned by S., as agent, to the insured. The latter had no knowledge of these facts.

Held, That A. was not the broker or agent of the insured, and his failure to notify S. of the condition of the risk was not chargeable to the insured.

Held, That the indorsement of S. was not sufficient notification to the insured that A. was not the agent of the company issuing the policy. *May vs. Western Assurance Co.*, 545.

8. RESPONSIBILITY FOR ACTS OF SOLICITING.—The plaintiff was employed by a general agent to solicit life risks for the company.

Held, That the company is liable upon the contract made with plaintiff unless he had knowledge of special limitations placed on the authority of the general agent in respect to such employment, if the contract was made in behalf of the company. The questions concerning such knowledge and as to whether the plaintiff was employed personally by the agent or in behalf of the company are questions for the jury. *Equitable Life Assurance Society vs. Brobst*, 625.

See APPLICATION 4, 5, 6; BROKER; CANCELLATION 1; LIGHTNING 1; OTHER INSURANCE 3, 4; PREMIUM 7, 9, 11, PROOFS OF LOSS 1, 2; TITLE 5; TONTINE.

ALIENATION. See TITLE.

ALTERATION. See AGENT 5.

APPLICATION.

1. INVALID AS EVIDENCE - FRAUDULENT AVOIDS POLICY.—The Pennsylvania statute prohibiting an application not attached to the policy to be used in any way to qualify the terms of the contract, does not prohibit the introduction of such an application for the purpose of showing fraud in the procuring of the contract.

Where the policy and by-laws of the company require a written application by the insured, a paper purporting to be an application whose questions were not in fact answered by the insured, but which were answered and the paper executed throughout by another in her name, the policy procured on such application was a fraud and void. *Carrigan vs. Mass. Ben. Ass'n*, 30.

2. CONSTRUCTION OF POLICY—EFFECT OF FRAUD—RECOVERY OF PREMIUM.—The provisions of a life insurance policy are construed and applied like the terms of any other contract, and such provisions may render the policy void, ab initio, by the terms of the same and the failure of warranty.

When a life policy is issued and accepted upon the expressed condition that the answers and statements of the application are warranted true in all respects, and that if the policy be obtained by any untrue answer or statement, or by any fraud, misrepresentation, or concealment, the policy shall be absolutely null and void; and, as to matters material to the risk, some of the answers and statements are untrue in fact, though made without actual fraud and under an innocent misapprehension of the purport of the questions and answers; no contract of insurance is thereby made, and the policy does not attach, but it is void, ab initio. When, for such a policy, premium has been paid by the applicant to the insurance company, such payment may be recovered back. *Connecticut Mutual Life Ins. Co. vs. Pyle*, 261.

3. UNTRUE STATEMENT—ILLNESS OR INJURY.—One of the conditions of a policy of insurance issued was that, if any untrue statement were made in the

application or policy, the company should be free from all liability under it.

The application for the policy set forth, "Have you been subject to or had any of the following disorders, open sores, lumps, or swelling of any kind? also "Have you ever had any malformation, illness, or injury, or undergone any surgical operation?" *Held*, That it would be unreasonable to suppose that the parties had in contemplation the reading and understanding of these questions in general terms, as it would be impossible for a person of mature years to remember the common and trivial ailments he may have suffered from in childhood. By open sores or swelling was meant such continuous or recurrent ones as result from disease or disorder, such as result by defective action from some functional derangement. By illness or injury was meant an illness or injury of such a nature and importance as would reasonably fall within the line of inquiry proper to be pursued in furtherance of the matter under consideration. *Home Mut. Life Ass'n of Pennsylvania vs. Gillespie*, 330.

4. **KNOWLEDGE OF AGENT—FRAUD—RETENTION BY INSURED.**—The application was a warranty that if the answers were in any respect untrue the policy should be void, and agreed that as the policy was to be issued at the home office, where only the written statements were acted on, no representations made by the party soliciting the insurance should be of any binding force unless reduced to writing in the application. Evidence was given that statements regarding the bodily health of the applicant were untrue in a material respect. But it was claimed that the agent was fully notified of all the facts, and declared that they were of no consequence, and that further the agent filled in the application, and that the answers were correctly made to him by the insured; an abstract of the application was also appended to the policy, and the attention of the insured was called to it with the request that the company should be informed of any inaccuracies in order that they might be corrected.

Held, That it was the duty of the insured to read the application, and it was error to instruct that if the insured was fraudulently misled by the agent, the company was responsible.

Held, That the retention of the policy by the insured, with the abstract of the application appended, was an acceptance of the application which made the holder a participant in any fraud, and the consequences could not afterwards be avoided. *New York Life Ins. Co. vs. Fletcher*, 401.

5. **MISSTATEMENTS BY AGENT.**—Where false statements regarding the value and exposures of the risk were written in the application by the agent without the knowledge of the insured, the latter will not be held responsible. *Stone vs. Hawkeye Ins. Co.*, 490.

6. **FALSE ANSWERS BY AGENT.**—The application was signed in blank by the insured and afterwards filled up by the soliciting agent who was furnished with blank applications by the company. The application was a warranty, and according to the statute of Iowa a copy was indorsed on the policy. The agent had no power to bind the company by contract.

Held, That the insured was not responsible for false answers in the application. *Donnelly vs. Cedar Rapids Ins. Co.*, 698.

7. In response to the question in the application, whether the applicant had ever applied for insurance in another company and had been unsuccessful, the answer was in the negative, whereas an application to such other company was signed and delivered to an agent authorized to receive it, and was not successful.

Held, That the response was materially false and vitiated the policy, and it was of no consequence whether or not the prior application had never been submitted to the company, but had been acted on without authority by its agent and medical examiner. *Edington vs. Etma Life Ins. Co.*, 711.

See MORTGAGE.

APPORTIONMENT. See CONTRIBUTION; OTHER INSURANCE 2.

ARBITRATION.

1. AGREEMENT WHEN VALID.—Agreements to submit to arbitration are valid when made after the subject of controversy has arisen, but not when they relate in advance to any controversy that may arise. The party claiming that the power of the court has been curtailed by such agreement must assume the onus probandi, showing a clear agreement. *Bauer vs. Sampson Lodge*, 86.
2. BREACH OF GOOD FAITH—EFFECT OF FAILURE.—Where there was evidence tending to show that the defendant acted in bad faith in refusing to go on with an arbitration or to secure a speedy appraisal, the question should have been submitted to a jury, whether there was such breach of good faith as relieved the plaintiff from the obligations of the arbitration clause.
If an arbitration fails through the fault of one of the parties, the party not in fault is not obligated to enter into a new arbitration, but may proceed at once to his remedy at law. *Uhrig vs. Williamsburgh City Fire Ins. Co.*, 312.
3. NOT OBLIGATORY—EVIDENCE OF LOSS.—The policy stipulated that in case of difference of opinion as to the amount of loss, it should be referred to three disinterested men to be chosen, the decision of the majority of whom was to be final and binding.

Held, That the agreement is collateral merely and not a condition precedent to recovery. Evidence of the amount of loss is admissible though no reference has been had. *Crossley vs. Connecticut Fire Ins. Co.*, 619.

See MEASURE OF DAMAGES.

ARSON.

1. EXCESSIVE VALUATION—EVIDENCE.—Overvaluation of insured property is competent evidence in case of arson, not for the purpose of impeaching the character of the insured, but as showing a motive for the crime. But the accused was entitled to an instruction that if the overvaluation was the result of mistake or error in judgment, it was not necessarily evidence of a wicked motive or criminal intent.
In order to convict of arson, all the jurors must be satisfied of the guilt beyond a reasonable doubt, and it is error to charge that there should be no acquittal unless all the jurors entertain a reasonable doubt of guilt. *Stitz vs. State of Indiana*, 386.
2. EVIDENCE OF.—Where the company defends on the ground of arson, evidence of previous bad character of the claimant as to honesty is inadmissible. *Stone vs. Hawkeye Ins. Co.*, 490

See EVIDENCE 1, 2; VACANT 5.

ASSESSMENT.

1. ABSENCE OF NOTICE.—The certificate required an annual assessment on or before a certain date, and the payment of a certain assessment on the death of every member; also that if said assessments were not received within thirty days of date of notice the certificate should be void.
Held, That there was no obligation to pay in the absence of notice of the annual assessment. *Covenant Mut. Benefit Ass'n vs. Spies et al.*, 144.
2. SUSPENSION IN CASE OF BENEVOLENT ASSOCIATION.—Where the constitution of a benefit society provides that the assessments for death benefits are to be made by the subordinate lodges, an assessment alleged to have been made by such a lodge upon its members at a time when it conclusively appears the lodge held no meetings, is not a valid assessment, and a suspension for failure to pay such supposed assessment is not a valid suspension. *Agnew vs. Grand Lodge A. O. U. W.*, 232.

3. **RULES GOVERNING PAYMENT OF IN BENEVOLENT ASSOCIATION.**—In a suit on a contract of life insurance, with conditions precedent which are referred to on the face of the contract, the burden is on the plaintiff to prove a compliance with such conditions, or a sufficient excuse for non-compliance.

If the excuse be a want of sufficient notice to pay an assessment, plaintiff must prove the insufficiency.

The act of an agent in receiving money at a time not authorized by the rules of the society does not bind the society. To establish a waiver as to such act, plaintiff must show knowledge and acquiescence on the part of the managing officers of the central society.

In the Knights of Honor, the financial reporter of the local lodge is not an officer of the supreme lodge.

If the member fails to object to a misappropriation of the funds contributed by him, his beneficiary cannot complain thereof.

Such a misappropriation would not excuse the non-payment of subsequent assessments, or justify a member in refusal to pay.

The rule charging with assessments all members who take the final degree "on and prior to" a certain date, makes them liable to contribute to all deaths occurring during that calendar day.

Moneys in the hands of the treasurer of the order, if already legally drawn upon to a less sum than \$2,000, are not "in" the W. and O. B. Fund, so as to prohibit the calling of a new assessment.

It is optional with the local lodges to allow sick benefits, and they are under no legal duty to pay the amount thereof, when allowed, upon the assessments of their members. *Eaton vs. Supreme Lodge Knights of Honor*, 762.

See PREMIUM; BENEVOLENT ASSOCIATION 7, 15; FRAUD 2; PREMIUM NOTE 3.

ASSIGNMENT.

1. **WHEN VALID.**—When A had his life insured and told the company he wished the insurance to be for B's benefit, and the company told A to take the policy out in his, A's, name and then make an assignment to B, the company will be estopped from claiming that the assignment was not good because it had been left in their hands, and A had continued to pay the premiums until his death. *Scott vs. Dickson*, 22.

2. **CERTIFICATES OF BENEVOLENT ASSOCIATION.**—Certificates issued by an association formed under the act, chapter 204, Laws of 1877, authorizing the formation of associations for the purpose of rendering assistance to the widows, orphans, or other dependents of deceased members, are not assignable or transferable by the members of such an association to any one not embraced within one of the classes mentioned in the statute. And this is so, although the beneficiary named in the certificate joins in the assignment. *Briggs vs. Earl*, 469.

3. **EFFECT OF INCUMBRANCE.**—A condition that the policy should be void in case of incumbrance is imported into the new contract with an assignee when the policy is assigned with the consent of the company, and though the assignee might not be affected by a previous incumbrance that had ceased, he would be affected if at the time of assignment or thereafter it was incumbered.

The consent to assignment and receipt of premium are not a waiver of the forfeiture unless the company had knowledge of the incumbrance. *Ellis vs. State Ins. Co.*, 481.

4. **EVIDENCE OF.**—The intestate died owning a benefit certificate in a mutual insurance corporation, made payable to his personal representative. The by-laws permitted assignment, prescribing the formalities. In a contest for the proceeds of the policy between the representative and some of the heirs, *Held*, That parol evidence of an assignment was inadmissible, and that the formalities of the assignment must be strictly followed, the same

being intended for the protection of the association. *Elliott vs. Whedbee*, 815.

See CONTRACT 1; CREDITOR 1; TITLE 8; WIFE'S POLICY.

ATTACHMENT.

RIGHTS OF CREDITORS—TITLE TO POLICY.—A policy of insurance upon the life of A was taken out, payable to A. his executors or administrators, for the benefit of his widow, if any; later, and when A was a widower, an attachment execution was issued by B, a creditor of A, against the insurance company, as garnishee of A; before an appearance entered or plea pleaded, A died, leaving no widow. *Held*. That the sum due from the insurance company on the policy was not, upon the death of A, bound by the attachment of B, but passed at once to his—A's—legal representatives as assets. *Day vs. New England Mut. Life Ins. Co.*, 744.

AVERAGE. See TOTAL LOSS.

BANKRUPTCY. See INSOLVENCY.

BENEFICIARY. See TITLE; BENEVOLENT ASSOCIATION; POLICY; PREMIUM 12; REFORMATION; WIFE'S POLICY.

BENEVOLENT ASSOCIATION.

1. **OBLIGATIONS OF MEMBERS—WHERE AN INSURANCE COMPANY.**—One who becomes a member of a benevolent order is chargeable with knowledge of its laws, and is bound by them unless illegal or requiring illegal acts, and is therefore bound by the by-laws.

Such organizations may require members to resort to prescribed methods of redressing grievances before invoking the power of the courts, but may not absolutely take away the right of action for money due.

A mutual benefit society which for agreed compensation agrees to pay benefits to its members, is not purely a benefit society, but is in respect to contracts to pay benefits an insurance company. *Bauer vs. Sampson Lodge, Knights of Pythias*, 81.

2. **MEMBERSHIP OR.—MEASURE OF LIABILITY.**—The complaint against a benevolent society set forth the issue of a certificate stipulating to pay a certain amount or so much thereof as might be collected by assessment, and that the society refused to make an assessment or to pay the sum.

Held, That a demurrer on the ground of failure to aver that there were members, and to state the number of them, who might be assessed, could not be sustained; it is for the company to show if there were not enough members to collect the whole amount, otherwise the claimant is entitled to recover the maximum amount. *Elkhart Mutual Aid, Benevolent & Relief Association vs. Houghton*, 97.

3. **RIGHTS OF MEMBERSHIP.**—A member of the order of Knights of Honor, who has been by his subordinate lodge suspended for immoral conduct, and for the non payment of assessment, loses his good standing thereby; and if he dies while under such suspension, his beneficiary is not entitled to recover the benefit.

A grand dictator having, upon an appeal by a suspended member, affirmed the order of suspension during the life of such member, cannot, after the death of the member recall his affirmation, or take any action to restore the dead member to good standing.

The remedy of a suspended member, who feels aggrieved by an order of the grand dictator, affirming the order of suspension is by an appeal to the supreme lodge as provided by the laws of the order. *Whipple vs. Supreme Lodge Knights of Honor*, 223.

4. **RIGHTS OF PRESUMPTIVE WIFE.**—A society chartered for the purpose of benefiting and aiding the widows and orphans of deceased members, on the death of the member, paid the money to the woman who was living with him. Afterwards, his wife, who was separated from him for some years,

claimed the money. *Held*, That as the company had never been notified of her claim, and had in good faith paid it to the person who they presumed was the wife of the deceased, she could not recover. *Supplee vs Knights of Birmingham of Pennsylvania*, 22'.

5. MEDICAL EXAMINER—RIGHTS OF MEMBERS.—Where, in case of a claim according to the by-laws of a benevolent association, the matter is referred to a board of physicians, whose report then goes to a supreme medical examiner for a decision, and the official acts of the latter are reported to the supreme council, a member is not obligated in the absence of a special provision to that effect to appeal to the supreme council before invoking the law.

A benevolent association cannot, by provisions in its constitution or by-laws, deprive a member of the right to resort to the courts to enforce his rights in respect to a claim. *Supreme Council of the Order of Chosen Friends vs. Garrigus*, 284.

6. CHANGE OF BENEFICIARY.—The beneficiary in a policy of life insurance issued by the Knights of Honor can be changed only in the manner prescribed by the constitution of that society,—by filling the necessary blank on back of policy, attestation by the "reporter," and surrender of the policy to the lodge, and the issuance of a new certificate. *Knights of Honor vs. Nairn*, 365.

7. ASSESSMENTS—MEASURE OF LIABILITY.—The by-laws of a beneficial association provided that upon the death of a member, and in order to make up the amount to be paid over to his nominee or nominees, each member should pay one dollar in gold or silver coin. It was further provided that at the death of a member who had regularly paid his assessments his nominee or nominees should be entitled to claim and receive from the association the amount collected on the assessment to be levied therefor. *Held*, that such nominee was entitled to claim from the association only the sum which was actually collected on an assessment, and not one dollar for each and every member.

The passage of a resolution by the members of such association authorizing a larger sum to be paid to such nominee will not entitle the latter to claim the same if the resolution was never adopted or ratified by the directors, without whose order no money could be appropriated or drawn from the treasury. *In Re Application of La Solidarite Mut. Ben. Ass'n*, 394.

8. CONSTRUCTION OF VERMONT STATUTE.—Under the provisions of Sec. 3,607, R. L., as amended by No. 45 of the acts of 1884, a mutual or co-operative life insurance association not organized under the laws of Vermont is not entitled to a license to transact business unless it has assets amounting to \$100,000, and as much more as is necessary to balance its outstanding liabilities, such liabilities computed and such assets invested as provided by said statute. *Granite State Mut. Aid Ass'n vs. Porter & Dubois, Commissioners*, 521.

9. CHANGE OF BENEFICIARY WHEN A WIFE—SUBORDINATE LODGE.—A certificate issued by a beneficial society, payable to the wife of a member by name, cannot be willed by him to another woman who might have supposed herself to be his wife.

Whether a payment made by officers of a subordinate lodge was a payment by such lodge or by the grand lodge in another State, held to be a question of fact to determine from the evidence as to whether such subordinate lodge had thus accepted its charter from the grand lodge.

The jurisdiction of a United States court must depend upon which body was liable and made the payment. *Supreme Lodge Knights of Honor vs. Morgan*, 529.

10. WHO MAY BE BENEFICIARIES.—A benevolent society was organized under the New York laws of 1875, whose certificate made no specific mention of life insurance, nor the restriction of benefits to members or their families as among its objects. The by-laws declared the object to be to secure

mutual benefit to their members and aid to their families or their assigns, and that the benefits were to be paid the heirs or beneficiaries of the members.

Held, That the beneficiaries were not restricted to members of the family of the insured. *Massey et al. vs. Mutual Relief Society*, 607.

11. **RIGHTS OF SUBORDINATE AND GRAND LODGE.**—A subordinate lodge of the Independent Order of B'nai B'rith had been duly incorporated under an act of the legislature. The grand lodge seeking to gain control of their endowment fund, the scheme was resisted by the subordinate lodge and the charter granted by the grand lodge was forfeited. In a suit instituted by the grand lodge, claiming title to the fund by reason of the forfeiture of the charter, *Held*, That the subordinate held the fund in controversy by virtue of its corporate character, and its right thereto was unaffected by the action of the grand lodge. *District B'nai B'rith vs. Jedidjah Lodge No. 7*, 674.

12. **CORPORATE RIGHTS AS TO FOREIGN JURISDICTION—DISCIPLINE.**—Whatever advantages may exist in affiliation with other associations, the rights of Michigan corporations must be governed by the laws of Michigan, and corporate privileges cannot be destroyed in violation of them.

No corporation can allow its members to be disfranchised by another body for any clause, or in any manner, which it could not have adopted for itself in the premises.

Where a corporator is deprived of valuable corporate rights in a beneficial society by interference, to which he has not assented, by an outside body, whose powers in the premises are not derived from the incorporation laws of the State, he can call upon his own corporation to do him justice.

All by-laws must be reasonable, and if not so are void.

The discipline to which a member of a beneficial society is liable for the offense of libeling another member is not ever to be exerted upon vague charges of libeling, and only in cases where the libel is without any reasonable cause. *Allnutt vs. High Court of Foresters*, 680.

13. **CERTIFICATE IS A CONTRACT—APPLICATION WHERE A WARRANTY—RIGHTS OF BENEFICIARY.**—The certificate of a benefit association is in legal contemplation a policy of insurance and governed by the same general rules of law.

Statements in the application must be incorporated or appropriately referred to in the contract to become warranties.

Where the charter of a benevolent association provides that the benefit shall be paid to the party designated in the application, or if that be impossible, to certain other parties named, the rights of the beneficiary become vested when nominated in the application, and the name of such beneficiary can not afterwards be changed by the member.

Where there is nothing in the charter conflicting, however, the member may perhaps change the beneficiary, but a charter limitation will prevail over any general rule of law. *Presbyterian Assurance Fund vs. Allen*, 768.

14. **CHANGE OF BENEFICIARY.**—Where the by-laws of a mutual benefit association, in the nature of a life insurance company, provide that upon the death of a member the benefit shall be paid to his direction, the member may change the beneficiary by surrendering his certificate of membership and procuring a new one made payable to the person therein named. *Barton vs. Provident Mut. Relief Ass'n*, 785.

15. **ASSESSMENT AS A WAIVER—ACTION ON CERTIFICATE.**—A mutual insurance company, after demanding, receiving, and retaining, until after the death of a member, money equal to the assessment due from him, cannot claim that the money was taken by mistake, and that the certificate is forfeited.

An action at law upon a certificate of mutual insurance cannot reach questions outside of such certificate, so as to enable the plaintiff to recover benefits otherwise than as specified in the certificate. *Bailey and Others vs. Mutual Benefit Ass'n*, 793.

16. **RIGHTS OF CREDITORS—HEIRS—CHANGE OF BENEFICIARY.**—The general laws of Massachusetts regarding life insurance companies do not apply to benevolent associations, and the funds of the latter are not attachable by creditors.

The by-laws of such an association provide that the balance of a benefit "shall be paid to the person or persons designated by the member in his application for membership or last legal assignment, provided such person or persons are heirs or members of the decedent's family."

Held, That the word "heirs" must be construed in a limited sense as applying to such as were entitled to inherit, not such as might under changed circumstances possibly inherit.

Held, That where the wife was originally designated, the member could not afterwards change to his mother, who was not dependent on him, but lived separately with her husband. *Elsay vs. Odd Fellows' Mutual Relief Association*, 797.

17. **CONSTRUCTION AS TO BENEFICIARY.**—A clause in the charter of a mutual insurance company, that the purpose is in part for the "relief of widows and orphans by voluntary contributions," does not mean that the benefit necessarily inures to the widow and orphans. The representative is entitled to recover, in the absence of a valid assignment under the by-laws, for the purposes of administration. *Elliott vs. Whedbee*, 815.

See **ASSESSMENT** 2, 3; **ASSIGNMENT** 2; **REFORMATION**.

BOND. See **AGENT** 1.

BOTTOMRY BOND. See **SEAWORTHINESS** 1.

BROKER.

AGENT OF THE COMPANY OR INSURED AS TO APPLICATION.—Where an application for insurance against loss by fire was obtained by one not an agent of the defendant, but a broker doing the business under an arrangement with defendant's duly authorized agent, by whom it was sent to defendant, and the defendant returned it for additional information as to the ownership and occupation of the property to be insured, and the agent gave the application to the broker with instructions to obtain the answers from the applicant, and the broker took the application away and returned it with the answers written in his own handwriting and not in accordance with the facts, although the broker at the time had full information as to the facts; *Held*, That the act of the broker under these circumstances was the act of the agent, and the knowledge of the broker, no matter when obtained, if before the answers were given, was the knowledge of the defendant, and it was estopped from setting up such false answers in defense. *Mullin vs. Vermont Mutual Fire Ins. Co.*, 562.

See **AGENT** 7; **CANCELLATION** 1; **PREMIUM** 3.

BUILDING. See **ADJACENT BUILDING**; **DESCRIPTION** 1, 4, 5, 6; **REPLACEMENT**; **RISK** 1; **VALUED POLICY** 1.

BURDEN OF PROOF. See **EVIDENCE**.

CANCELLATION.

1. **BROKER—AGENT OF THE COMPANY OR INSURED.**—The agent of the insured for the purpose of procuring insurance, is not from that fact his agent to receive notice of cancellation.

The case is not affected by the clause that the insurance broker shall be deemed the agent of the insured in any transaction relating to the insurance, for notice of cancellation does not relate to the insurance. *Von Wien vs. Scottish Union and National Ins Co.*, 158.

2. **WHEN COMPLETE.**—A notice to the insured to return the policy for cancellation, upon which the ratable proportion of the unearned premium would be paid, does not effect a cancellation where the policy provides that it

may be canceled upon notification and refunding such unearned premium. *Griffey vs. New York Central Ins. Co.*, 186.

3. **WHAT IS NEEDED TO COMPLETE.—ACCEPTANCE OF PREMIUM AS A WAIVER.**—An insurance policy containing stipulations in these words: "This company may, at any time, cancel this policy by returning the unexpired premium pro rata." "The assured may, at any time, have the policy canceled by paying the customary short rates for the expired time of full term," can be canceled by the insurer, but the notice of cancellation must be given and the return premium tendered at the same time. Without both concurring the policy cannot be canceled.

If the company becomes aware of a violation of any condition of the policy and fails to cancel same, but receives a premium thereon, the policy continues in force to the expiration of the term paid for unless the policy be canceled as above. Where the policy is one continuing in force upon the payment of yearly installments, if the policy be not canceled as above, and upon any installment becoming due a tender is made and refused, the policy continues in force; but where the money is not actually offered but the insured proposes to get the money and pay the installment if the agent would state that the policy is good, there is no such tender as will bind the insurer. *Continental Ins. Co. vs. Busby*, 736.

See AGENT 4; INTERPRETANCE 1, 2; PREMIUM NOTE 1.

CARGO. See RISK 2.

CARRIER.

1. **SUBROGATION IN CASE OF.**—The insurance was on cotton in transit. The receipts of the railroad carrier stipulated that in case of loss or damage during transportation, the company incurring the liability should have the benefit of any insurance. The insurer had no knowledge of the receipts.

Held, That where carrier and insurer are alike liable for the loss, the general rule is that the latter, upon paying the loss, is subrogated to the claims of the owner against the carrier. But the owner is not obligated to so contract as that he may have a remedy against the carrier. The insurer is entitled to preference only where there is no agreement to the contrary.

Held, That the agreement with the carrier did not violate a policy clause forbidding the interest insured to be sold, assigned, transferred, or pledged.

Held, That in the absence of fraud, the insurer making no inquiry regarding the bills of lading, insured subject to their stipulations. *Jackson Co. vs. Boylston Mut. Ins. Co.*, 47.

2. **OTHER INSURANCE.—CONTRIBUTION.**—Where owners of certain cotton ship it by a carrier, and obtain insurance on it, and the carrier, at the time, has annual policies covering the cargoes of its steamer, which policies contain a clause limiting the insurance to the interest of the insured, and a fire occurs, this does not constitute double insurance, and the shipper's insurers cannot make the carrier's insurers contribute to their loss. *Royster et al. vs. Roanoke, N. & B. S. B. Co. et al.*, 843.
3. **SUBROGATION IN CASE OF.**—A stipulation in a bill of lading that the carrier shall have the benefit of any insurance on the goods is a valid one, and in such case, even though the loss be occasioned by the negligence of the carrier, the insurance company cannot be subrogated to the rights of the shipper to recover damages for such negligence.

If, as is well settled, a carrier may insure against loss, though occasioned by the negligence of his own employees, he may also lawfully stipulate with the owner of goods to be allowed the benefit of insurance voluntarily obtained by the latter.

Where goods were shipped under an oral agreement, with the understanding that bills of lading would be subsequently issued, and afterward and

after the effecting of insurance by the shipper, bills of lading were issued containing a provision giving to the carrier the benefit of any insurance on the goods, which bills were not objected to by the shipper, and were similar to bills previously issued to him on other shipments, the contract of carriage is to be treated as if made on the day of the oral agreement and the insurance company claiming to be subrogated to the rights of the shipper is bound by the conditions of the bill of lading. *Phœnix Ins. Co. vs. Erie and Western Transportation Co.*, 574.

CERTIFICATE. See **BENEVOLENT ASSOCIATION**; **PROOFS OF LOSS** 6.

CHARTER. See **BENEVOLENT ASSOCIATION** 16; **MUTUAL COMPANY**.

CO-INSURANCE. See **CONTRIBUTION** 1; **OTHER INSURANCE**.

- **CONSTRUCTION.** See **APPLICATION** 2; **BENEVOLENT ASSOCIATION** 8, 16; **KEEPING**; **LICENSE**; **LIGHTNING** 2.

CONTAINED IN. See **DESCRIPTION** 2.

CONTRACT.

1. **OBLIGATIONS UNDER PRELIMINARY—ABANDONMENT—RIGHTS OF ASSIGNEES IN CASE OF INSOLVENCY.**—A mere preliminary contract to insure is one for which an action lies for the breach, and the loss may be recovered. Under such contract the insurer is within a reasonable time bound to issue a policy, and the insured to pay the premium upon its issue. Either party not in default may compel performance, or, treating the refusal as an abandonment, may terminate the contract.

The custom in the case of a marine policy was to issue the policy in ten or twenty days upon delivery of a note or payment of premium. But before the time had expired the applicant became insolvent and made an assignment.

Held, That the assignee took the contract subject to the payment of premium or giving of a note.

The applicant and assignee were notified by the insurer that it would not be bound unless the premium was properly secured, but they did nothing.

Held, That this was a virtual abandonment of the contract, which was further evidenced by the parties procuring a new and different insurance upon the same cargo insured.

Held, That the subsequent acceptance of premium by the company under similar circumstances in the case of another contract, where there had been no loss, was not a waiver of the default here; the company might recognize the validity of one contract where it was to its interest, and deny that of the other at its election. *Hubbel vs. Pacific Mut. Ins. Co.*, 42.

2. **ENTIRE OR SEVERABLE.**—The policy was for separate amounts upon the building and upon personal property in separate amounts.

Held, That the contract was severable, and misrepresentations as to the ownership of the building would not vitiate the policy as to the personal property. *Schuster vs. Dutchess County Mutual Ins. Co.*, 463.

3. **WHEN INCOMPLETE.**—An agent agreed to insure plaintiff's house, on certain specified terms, in one of the companies represented by him, but not designated, and one of such companies thereupon decided to insure the house upon entirely different terms, and thereafter, before an acceptance of its terms, rejected the risk.

Held, That there was no contract of insurance. *Sheldon vs. Heckla Fire Ins. Co.*, 622.

See **POLICY CONTRACT**; **POLICY**; **AGENT** 3; **BENEVOLENT ASSOCIATION** 13; **PREMIUM** 5; **ULTRA VIRES**; **UNAUTHORIZED INSURANCE** 1.

CONTRIBUTION.

1. **CO-INSURANCE.**—The policy provided that the insured should maintain insurance on the property to the extent of four-fifths of the value, and in case of failure so to do "the assured shall be a co-insurer to the extent of such deficit, and in that event shall bear his, her, or their proportion of any loss;" but that in case the insurance exceeded such four-fifths, the assured should not recover from the company more than its pro-rata of the cash value of the property.

The insured failed to maintain other insurance to the extent of four-fifths, the deficiency being about \$10,000.

Held, That the company was not a co-insurer with the insured of the deficiency so as to make the company bear \$5,000 of the amount, but that the insured was an insurer to the extent of the whole \$10,000, and must contribute to that extent with the company. *Cheabrough vs. Home Ins. Co.*, 515.

2. **REPLACEMENT IN CASE OF MORTGAGEE.**—The property was insured independently by the mortgagee, the owner of the ground rents, and the lessee. A loss occurred and the property was replaced by one the insurers of the lessee.

Held, That while entitled to contribution from its co-insurers of the same interest, the company replacing could not call upon the insurers of the other interests.

- In order to entitle to contribution the insurance must be for the same person, on the same subject-matter, and against the same risks. *Conn. Fire Ins. Co. vs. Merchants and Mechanics' Ins. Co.*, 615.

See CANCELLATION 2.

CO-OPERATIVE. See BENEVOLENT ASSOCIATION.

CREDIT. See PREMIUM.

CREDITOR.

1. **FRAUDULENT ASSIGNMENT IN CASE OF INSOLVENCY—WIFE'S POLICY.**—A bill in equity may be maintained by creditors of a deceased debtor to set aside a fraudulent assignment of a life insurance policy originally payable to the debtor, his executors, administrators, and assigns, but fraudulently assigned by him to his wife while he was insolvent, and without valuable consideration, notwithstanding such creditors have not obtained judgments at law against the debtor in his lifetime, or against his representatives after his decease; it appearing that the complainants had, prior to the death of the debtor, obtained a decree in equity against him and his wife in the circuit court of the United States for the northern district of Florida, in which the amount of the complainants' debts was adjusted, and in which the said debtor was adjudged to be absolutely insolvent.

It appearing that the fund would be liable to be placed out of the jurisdiction of the court, and beyond the reach of creditors in case they should be ultimately found to be entitled, if the injunction should be refused, *Held*, that an injunction pendente lite should be granted to restrain the insurance company from paying over the money under the policies until the rights of the parties should be determined. *Etna National Bank et al. vs. Manhattan Life Ins. Co. et al.*, 235, 239.

2. **RIGHTS OF.**—A life policy was payable to the insured, his executors, administrators, and assigns for the sole benefit of the children of the insured. The plaintiff alleged that he was a creditor of one of the children, and summoned the company as trustee.

Held, That in the absence of an assignment only the administrator or executor could maintain an action at law against the company, and the latter was not chargeable as trustee. *Stowe vs. Phinney*, 750.

See ATTACHMENT; BENEVOLENT ASSOCIATION 16; INSOLVENCY; WIFE'S POLICY 2, 4, 6.

CUSTOM.

NOT APPLICABLE WHEN.—A custom cannot be invoked to deprive the party having a claim of legal remedies. *Bauer vs. Sampson Lodge*, 88.

See KEEPING 3.

DAMAGE. See MEASURE OF DAMAGE.

DESCRIPTION.

1. ADJACENT BUILDING—ADDITION.—The insurer was furnished a memorandum by the agent of the insured, containing among other things the statement, "building detached on all sides," but not stating any distances from other buildings. The policy thereupon issued upon the factory and machinery provided that the insurance might be continued for such further term as might be agreed on, the premium therefor being paid, and a renewal receipt being given; and it should be considered as continued under the original representation in so far as not varied by a new representation in writing, which should, in all cases, be made when the risk had been changed, either within itself or by surrounding or adjacent buildings; otherwise the policy and renewal should be void. Also that if, after the insurance had been effected, either by the original policy or renewal, it should be void if the risk be increased without notice and indorsement. A warehouse forty feet distant was subsequently built by insured. Afterwards insured applied to "renew by new policy," whereupon a new policy was issued renewing the pre-existing insurance and containing the same provisions. The property was destroyed through a fire originating in the warehouse.

Held, That a failure to notify the insurer of the erection of the warehouse avoided the policy.

Held, That the warehouse was not an "addition" within the policy. *Peoria Sugar Refining Co. vs. People's Fire Ins. Co.*, 52.

2. CONTAINED IN—INCREASE OF RISK.—The policy, among other things, covered wearing apparel, and the insured property was described as "contained in a frame dwelling, etc."

Held, That a sealskin dolman destroyed while temporarily absent in a fur store for repairs was still covered by the policy. The words "contained in" are only a warranty as to the usual place of deposit when the articles are not elsewhere as an incident to their use.

Held, That the case was not affected by the risk being greater at the fur store. *Noyes vs. Northwestern Nat. Ins. Co.*, 57.

3. MISTAKE IN NUMBER.—The property was described as in warehouse No. 1, on the corner of T. and K. Streets.

Held, That where it sufficiently appeared that the described property was in the warehouse on the corner, which was, however, warehouse No. 2, the misdescription as to the number will not affect right of recovery. *Hatch vs. New Zealand Ins. Co.*, 70.

4. FISHING SCOW AS BUILDING.—In determining whether a fishing scow was, in the policy of insurance, included in the word "building," and thereby affected by all the terms and conditions of the policy as a building, evidence that similar scows, as well as the one in question, were used and occupied as buildings, for purposes of residence and business, is admissible. *Enos vs. Sun Ins. Co.*, 135.

5. BARN AS A HOUSE.—Whether a barn was intended to be included within a bill of sale, in which the property sold was described as "the Wolf houses," is a question of fact for the jury, and it is error for the court to instruct the jury that the bill of sale could not include the barn. *Claffey vs. Hartford Fire Ins. Co.*, 237.

6. DETACHED BUILDING—TITLE IN CASE OF GOVERNMENT LAND.—The property was described as "buildings adjoining and communicating, occupied * * situated detached."

Held, That the meaning was that the buildings were detached from others, not from each other.

The buildings stood on land of the United States, and were described in a printed slip attached to the policy by the agent, and forming part of it, as "their buildings" occupied as store, office, club, etc., at Fort McGinnis, with other words indicating their character as being used by a post trader.

Held, That the company was bound to know that a post trader at a military post could not own the land, and a provision making the policy void if the title to the land was not in the insured, is repugnant and void. *Broadwater vs. Lion Fire Ins. Co.*, 295.

7. **ERROR AS TO SEX.**—The policy was issued to L. Simon, and the interest of the insured, who was a woman, was referred to throughout as "his."

Held, That where the name of the insured was L. Simon, the error in regard to her sex will not defeat recovery if she be shown to be the owner. *Simon vs. Home Ins. Co.*, 553.

8. **USE OR OCCUPATION—KNOWLEDGE OF AGENT—INACCURACIES IN DIAGRAM.**—The insured property was described as used for a residence and stores, and the application was a warranty. The agent acted on his own knowledge and not on the application in making out the policy.

Held, That the fact that a portion of the premises was used for a restaurant and a bakery will not work a forfeiture, nor was it necessary to specify the presence of a brick oven where the agent was familiar with the premises.

Held, That inaccuracies in the diagram connected with the application regarding adjacent buildings which are corrected in the agent's report are not a ground of complaint.

Held, That where the agent authorized to issue the policy prepared such application and contract as he elected from familiarity with the property, imperfections in the representations of the insured cannot be complained of. *Richards vs. Washington F. & M. Ins. Co.*, 598.

9. **CHANGE OF PLACE OF STORAGE—INSUFFICIENT NOTICE.**—Where personal property is described in a policy of insurance as being situate in a particular building, and such place of storage is afterward changed without the consent of the insurer, and loss accrues, no recovery can be had.

Where the assured notified the company that she would change the place of storage, and was informed that the assent of the company to such change, when made, must be entered upon the policy of insurance, and nothing further is done by the assured, either notifying the company of the change made or procuring its assent, such notice is not sufficient to bind the company. *Phoenix Fire Ins. Co. vs. Vorhis*, 865.

See **USE**.

DIAGRAM. See **DESCRIPTION 8**.

DILIGENCE. See **NOTICE**.

DIVIDEND. See **POLICY 1; WIFE'S POLICY 3**.

DWELLING. See **DESCRIPTION 8; VACANT; USE**.

DYNAMITE. See **KEEPING 3**.

EQUITY. See **ACTION 6; REFORMATION; INTemperance 1**.

ERROR. See **ACTION**.

EVIDENCE.

1. **MOTIVE IN CASE OF ARSON.**—Every fact which may throw light upon the transaction, as by illustrating the possible motive of the insured, is proper evidence when the defense is alleged arson. But declarations of the in-

VOL. XV.—57.

sured must be so connected with the transaction as to be part of the res gestæ. *Dwyer vs. Continental Ins. Co.*, 72.

2. CHARACTER IN CARE OF ARSON.—Plaintiff's general good character is not a legitimate subject of proof in a civil suit on a policy, although the defendant in its plea may charge a crime to relieve itself of liability. *American F. Ins. Co. vs. Hasen*, 114.

3. REHEARING.—Evidence admitted on former hearing will not be excluded on rehearing in the absence of new facts on account of a better legal argument. *Ellis vs. State Ins. Co.*, 482.

4. BURDEN OF PROOF—NEW TRIAL.—The burden of proof as to answer in application is on the company.

Evidence referred to in a motion for a new trial as contained in a bill of exceptions is not so contained where no bill of exceptions was not signed at the time. *N. W. Mut. Life Ins. Co. vs. Hazelett*, 344.

5. EXPERT AS TO INCREASE OF RISK.—The mere fact that a witness is an agent does not qualify him to testify as an expert concerning increase of risk. He must be experienced through his duties in passing upon risks. *Stennett vs. Pennsylvania Fire Ins. Co.*, 536.

See ACTION 2; APPLICATION 1; ARBITRATION 2; ARSON; ASSIGNMENT 4; FRAUD 1; OTHER INSURANCE 4; PLEADING; PRACTICE; PREMIUM 9, 10; PROOFS OF DEATH; PROOFS OF LOSS; SUCCESSION 3; TITLE 3; TONTINE; USE 1, 5.

EXPENSES. See MEASURE OF DAMAGE; SRAVORTHNESS 1.

EXPERT. See EVIDENCE 5.

FACTORY. See DESCRIPTION 1; USE.

FIRE.

SPONTANEOUS COMBUSTION.—Oil-cloth clothing, insured under a marine policy insuring also against fire, was damaged by spontaneous combustion due to its own proper vice.

Held, That this was not a damage by fire within the policy. *Providence etc. Ins. Co. vs. Adler*, 793.

FOREIGN COMPANY. See UNAUTHORIZED INSURANCE.

FORFEITURE. See INTemperance 2; PREMIUM 5.

FRAUD.

1. MURDER—INSURABLE INTEREST—EVIDENCE.—At the solicitation of H., who paid the premiums and took an assignment of the policy, an endowment policy was issued on the life of A., payable to A. or his assigns after its maturity, or to his legal representatives in case of previous death. H. was shortly afterwards convicted upon the charge of murdering A.

Held, That in a suit by the legal representatives of A. to recover on the policy, it was error to charge that evidence of fraud on the part of H. was inadmissible on the ground that H. had no legal interest in the policy until its maturity, the assignment applied to a claim arising prior as well as subsequent to its maturity.

Held, That evidence was admissible in support of fraud, showing that H. took out similar policies in other companies about the same time.

Held, That the murder committed by H. defeated all recovery on the policy. *Mutual Life Ins. Co. vs. Armstrong*, 427.

2. LIABILITY OF OFFICERS OF ASSESSMENT COMPANY—ACTION BY RECEIVER.—Proceedings were commenced to dissolve a speculative assessment company, and a receiver appointed who brought a bill against the officers to recover moneys alleged to be fraudulently appropriated.

Held, That it is no answer to such bill to allege that the company had dissolved and all its obligations had been canceled by forfeiture of contracts

before the commencement of proceedings. The officers have no right to retain moneys fraudulently appropriated. *McCarthy et al. Appeal*, 551.

3. MEASURE OF DAMAGES.—A finding of damages trifling in comparison with the amount claimed is in the absence of explanation a proof of fraud. *Ferris vs. Kenton Ins. Co.*, 879.
- See ACTION 2, 3; APPLICATION 1, 2, 4; CREDITOR 1, PRACTICE 1, PROOFS OF LOSS 11; TONTINE, VALUATION, WIFE'S POLICY 6, 8.

FRIENDLY SOCIETY. See BENEVOLENT ASSOCIATION.

FUND. See INSURANCE MONEY; INSOLVENCY; TITLE; TONTINE.

HUSBAND. See WIFE'S POLICY.

INCENDIARISM. See ARSON.

INCREASE OF RISK. See DESCRIPTION 2; RISK; USE 1.

INCUMBRANCE. See MORTGAGE; TITLE; ASSIGNMENT 3.

INFLAMMABLES. See KEEPING AND STORING.

INJUNCTION. See PLEADING 3.

INSOLVENCY.

1. TITLE TO FUND.—The sum payable under an insurance policy to the defendant absolutely, or in a contingency, passes, in case of his insolvency, to his assignee. *Bassett vs. Parsons*, 399.
2. TITLE OF RECEIVER.—It was sought to have a judgment paid out of surplus realized by the receiver of an insolvent life company from the sale of mortgaged property on the ground that the judgment was a lien prior to that of the receiver.

Held, That the receiver became vested on his appointment with the title to all real estate, and any title remaining in the company was merely formal and in trust for the receiver, the title of the latter was therefore superior to the judgment lien. *Attorney-General vs. Atlantic Mut. Ins. Co.*, 472.

See CONTRACT 1; CREDITOR; FRAUD 2; PREMIUM NOTE 3.

INSURABLE INTEREST.

1. OF GRANDFATHER.—Where a grandfather, residing with his grandson, may have procured a policy on his life in favor of the grandson, himself paying the premiums, it is not error to instruct that in the absence of fraud there was sufficient insurable interest. *Elkhart Mut. Relief Ass'n vs. Houghton*, 97.
2. WHAT CONSTITUTES.—A direct pecuniary interest in a building that may be damaged by the destruction of the building by fire, constitutes an insurable interest. *Mutual Fire Ins. Co. vs. Wagner*, 704.

See FRAUD 1; WIFE'S POLICY 11.

INVENTORY. See PROOFS OF LOSS 11.

INSURANCE MONEY. See BENEFICIARY; TITLE; MORTGAGE 2, 3; POLICY 2.

INSURANCE COMPANY. See BENEVOLENT ASSOCIATION 1.

INTEMPERANCE.

1. CANCELLATION OF POLICY IN EQUITY.—A court of equity will not set aside a contract of life insurance during the life of the assured, on the ground that it has been rendered void by something not appearing on the face of the policy, and which can be proved by extrinsic evidence.
- As the assured, who is now intemperate, may reform and live out the ordinary expectation of life, this is not a case for the ordinary exercise of the discretionary power of a court of equity to order a cancellation, even if such power here existed. *Conn. Mut. Life Ins. Co. vs. Bear*, 315.

2. **FORFEITURE—CANCELLATION.**—A printed stipulation provided among other things that in case of excessive intemperance the policy should be absolutely forfeited. Another stipulation which was complete in itself provided that in such case the company might cancel the policy and absolve itself from liability, except for the surrender value.

Held, That a forfeiture will be enforced where required by the terms, but where conditions are inconsistent that most favorable to the insured will prevail.

Held, That in order to absolve itself from liability the company must cancel, and a demurrer on the ground of failure so to do will be sustained. *N. W. Mut. Life Ins. Co. vs. Haze'ett*, 344.

INTEREST. See **LIMITATION**; **POLICY 1**; **PREMIUM 5**; **PREMIUM NOTE 2**; **TITLE**.

JURISDICTION. See **ACTION**.

JURY. See **ACTION**; **EVIDENCE**; **NOTICE 1**.

KEEPING OR STORING.

1. **CONSTRUCTION AS TO INFLAMMABLES.**—The policy on a hotel provided that the assured should not keep any burning fluid without written permission; that kerosene, carbon oils of any description, or any other inflammable liquid, is not to be stored, used, kept, or allowed on the premises, temporarily or permanently, for sale or otherwise, without written permission, except the use of refined coal, kerosene, or other carbon oil for lights if the same is drawn and the lamps filled by daylight. Otherwise, the policy shall be null and void.

Held, That an averment of the keeping and using of kerosene in violation of the condition sufficiently alleges its use otherwise than for lights, and its drawing otherwise than by daylight.

Held, That a violation of the conditions by any one permitted by the insured to occupy and control the premises, is a violation by the insured.

Held, That an indorsement on the policy of privilege to use gasoline gas, gasometer, blower, and generator being distant sixty feet from building, did not sanction the keeping or storing of gasoline, except as needed for actual use in the apparatus, and where such use of the apparatus had been discontinued, the further keeping was not authorized. *Liverpool & London & Globe Ins. Co. vs. Gunther*, 161.

2. **OF NAPHTHA NECESSARY FOR BUSINESS.**—Where the policy is on "woolen mill and contents," parol evidence is admissible to show the nature of the contents; otherwise the insurance may be void for uncertainty.

The issue of such a policy, with knowledge of the fact that naphtha was necessarily used in the business, was a waiver of a printed condition that the policy should be void in case of its keeping or use. *Wheeler vs. Traders' Ins. Co.*, 184.

3. **DYNAMITE—WAIVER BY PAROL—CUSTOM.**—The policy, which was originally on stock in a building used as a store, was subsequently extended to cover stock in an adjoining building used as a warehouse. The policy provided that it should be void if among other things nitro-glycerine should be kept.

Held, That dynamite or giant powder was nitro-glycerine within the meaning of the policy.

Held, That the keeping of such dynamite in the warehouse avoided the policy.

Held, That such a provision cannot be waived by a parol agreement at the time of application.

Held, That a custom as to keeping cannot prevail against a direct prohibition in the policy. *Sperry vs. Springfield Fire & Marine Ins. Co.*, 270.

KEROSENE. See **KEEPING OR STORING**.

KNOWLEDGE. See AGENT; NEGLIGENCE; SEAWORTHINESS 2; TITLE 5.

LAPSE. See FORFEITURE; WIFE'S POLICY.

LIABILITY. See AGENT 1; BENEVOLENT ASSOCIATION 2; MEASURE OF DAMAGE; MUTUAL COMPANY 2; NEGLIGENCE; REPLACEMENT 1, 2.

LICENSE.

CONSTRUCTION OF MISSISSIPPI STATUTE—TAXATION.—A Mississippi act provided for certain license fees for the privilege among others of keeping a store, and that any person who should exercise the privilege without paying the price and obtaining the license should suffer fine or imprisonment, and all contracts made with the violator in reference to the business thus carried on should be void only so far as such violator may base any claim on them, and no suit should be maintainable thereon by such violator.

Held, That the statute applies as well to an insufficient license as to a business carried on without license.

Held, That the violator may maintain suits to defend title to his property, but not to enforce contract rights in respect to the business.

Held, That a policy on the stock of goods is incidental to the business, and in case of loss, payment cannot be enforced by a merchant who has taken out license insufficient for the quantity of his stock. *Pollard vs. Phoenix Ins. Co.*, 376.

LIFE ESTATE. See TITLE 4.

LIGHTNING.

1. WAIVER BY AGENT AND ADJUSTER—LIMITATION.—The policy insured a horse against fire or lightning. The insured notified the agent of the loss, but declined to state the cause, claiming that the agent who procured the insurance had assured him that the policy would cover a loss from any cause.

Held, That a reply by the agent that the policy insured only against fire and lightning, and that the company was not liable, was not a waiver of proofs.

Held, That a refusal of the adjuster to examine the loss on the ground that it was not caused by lightning when no claim to the contrary had been made, was not a waiver of proofs.

In the absence of such waiver suit must be brought within the time specified in the policy. *Cornett vs. Phoenix Ins. Co.*, 128.

2. CONSTRUCTION AS TO RISK.—The insurance was against fire on horses and colts while in barn, "and by lightning only while in use, or running in pasture, or yard on his farm, in the town of Le Sueur."

Held, That the insurance against lightning was not restricted to the farm, but was co-extensive with the town.

Held, That punctuation is a very fallible standard of interpretation, and will not be allowed to overrule a meaning ascertained from other sources, and the nature and uses of the property will be considered in the construction as to a loss within the risk.

Held, That a former policy on the same risk is not evidence as to an alleged fraudulent change of punctuation. *Boright vs. Springfield F. & M. Ins. Co.*, 306.

3. IN CASE OF WIND.—If a house be struck by lightning and subsequently destroyed by wind, an insurer against lightning would be liable only for the amount of damage done by the former. *Karibo vs. Ins. Co. of N. A.*, 478.

LIMITATION.

INTEREST.—Where the policy provides that the loss should be paid within sixty days after proof of loss, interest should be computed from the expi-

ration of that time, and not from the date of loss. *Queen Ins Co. vs. Jefferson Ice Co.*, 109.

See ACTION 1; LIGHTNING 1.

LODGE. See BENEVOLENT ASSOCIATION.

LOSS. See MEASURE OF DAMAGE.

MEASURE OF DAMAGE.

ARBITRATION—EVIDENCE OF AWARD—REPLACEMENT—PROOFS OF LOSS—EXPENSE OF REMOVAL.—Where there was no legal evidence of the amount of damages except the appraisal, a charge to the jury that if the arbitrators exceeded their authority the plaintiff was entitled to whatever damages he had suffered, would be fatal except for the fact that it affirmatively appeared not to have influenced the verdict.

Evidence of an award to a co-tenant from another company for damages to his interest is not admissible where it does not affect the liability of the company defendant.

A provision allowing the company to elect to rebuild within sixty days after the completion of proofs, refers to the proofs unconditionally required by the policy and not to subsequent optional proceedings, also provided for in order to ascertain the amount of loss.

The fact that machinery damaged belonged to another party and the plaintiff could compel its removal by him from the building did not necessarily preclude the plaintiff from claiming for the expense of such removal as a preliminary necessity to repairing the damage where the policy indemnified for the expense of such repairs. *Clover vs. Greenwich Ins. Co.*, 214.

See LIABILITY; PROOFS OF LOSS 9; REPLACEMENT 1, 2; SUBROGATION; VALUED POLICY 1.

MEDICAL ATTENDANT. See BENEVOLENT ASSOCIATION 5.

MEMBERS. See BENEVOLENT ASSOCIATION; MUTUAL COMPANY.

MISREPRESENTATION. See REPRESENTATION.

MISTAKE. See DESCRIPTION 3.

MORTGAGE.

1. **OF PART AND SUBSEQUENTLY OF WHOLE—REPRESENTATIONS IN APPLICATION.**—The plaintiff in his application for insurance answered "No" to an interrogatory, which was, "If incumbered, how and to what amount." At that time there was a mortgage upon a part of the insured premises. This mortgage was subsequently removed, and a new mortgage, covering the entire premises, placed thereon, with the consent of the insurance company, for the approval of which they were paid. The policy did not in terms make the application a part of the policy, it stated "this policy is made and accepted in reference to the conditions hereto annexed, as well as the application and survey, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for.

Held, That the answer in the application did not avoid the policy. *Lebanon Mutual Ins. Co vs. Loesch*, 104.

2. **TRANSFER OF TITLE—APPLICATION OF INSURANCE MONEY.**—B. borrowed \$19,000 from I., and gave his bond for that amount, and secured it by mortgage on certain real estate in Chicago. The mortgage provided that B. should keep the property insured against fire and assign the policies as collateral security, which was done. The mortgage provided that in case of loss the mortgagee and his assigns might collect the policies and apply the money in payment of the loan. B. subsequently conveyed the property, in consideration of love and affection, to his children, reserving a life estate therein to himself. I. sold and assigned the bond and mortgage to C., and the bond became due and remained unpaid until the buildings

were destroyed by fire. C. collected \$8,875 on the policies and gave B. credit on his bond for that amount. Subsequently, at his request, B. was allowed to renew the mortgage for five years, and to receive and expend the amount collected on the policies, less the interest due on the bond, in restoring the burned buildings.

Held, That the money paid to C. did not extinguish the mortgage pro tanto; that the agreement between B., as life tenant, and C. was valid; and that C. was entitled to foreclose the mortgage on default in payment thereof. *Bryant vs. Charter Oak Life Ins. Co.*, 132.

3. **REPLACEMENT AND TITLE TO INSURANCE MONEY IN CASE OF JOINT OWNERS.**—Property owned by a father and two daughters was mortgaged to an insurance company, and pursuant to a stipulation in the mortgage a policy was taken out in the name of the father, and made payable to the mortgagee. Upon the subsequent destruction of the property, the mortgagee entered into an agreement with the father that the insurance money should be deposited in bank and applied to replacing the property. No replacement, however, was made.

Held, That the insurance, though in the name of the father, covered the interests of the daughters, and the company had no right without their consent to apply the proceeds in any other way than that of reducing the mortgage; or if it did so was bound to see that the replacement was made.

Held, In a suit for foreclosure, that the insurance money should be credited on the mortgage. *Connecticut Mut. Life Ins. Co. vs. Scammon*, 415.

4. **OF PART.**—A policy insuring on certain personal property in a barn, including farming implements, wagons, etc., whose provision against alienation or mortgage is violated by mortgaging a certain portion of the property, is not thereby vitiated as respects the portion not mortgaged. *Calvert vs. Ohio Farmers' Ins. Co.*, 559.

5. **SUBROGATION—TENDER.**—A vendor held a policy of insurance on the dwelling-house standing on the premises sold. She took a mortgage for a part of the purchase money which was in excess of the amount due on the policy. She did not assign the policy at the time of the conveyance nor until after the house was burned; the company tendered the amount due on the mortgage, and demanded an assignment of it, which was refused. *Held*, That the company was entitled to the mortgage. *Held*, also, that in order to carry costs, it was not necessary that the company should tender the whole amount of the unpaid purchase money. *Boundbrook Mut. Fire Ins. Ass'n. vs. Nelson*, 869.

MORTGAGEE.

EFFECTS OF REPAIRS BY—TENDER—SUBROGATION.—The policy was payable to the mortgagee. The latter, by agreement with the mortgagor, began repairs needed to protect the property from further damage before the expiration of the time within which the company might elect to repair.

Held, That in the absence of any subsequent proposal by the company to repair, the right to recover damages for the loss was not defeated.

Held, That a tender of the amount due on the mortgage with interest is not sufficient to entitle the company to claim an assignment of the mortgage after suit has been begun.

Held, That such a tender should also include the sum expended for repairs, for which the mortgagee was entitled to re-imbursement. *Elliot Five Cents Savings Bank vs. Commercial Union Ins. Co.*, 777.

See CONTRIBUTION 2; OTHER INSURANCE 4; POLICY 2.

MURDER. See FRAUD 1.

MUTUAL COMPANY.

1. **RESPONSIBILITIES OF MEMBERS.**—Persons dealing with a mutual corporation are affected with notice of the provisions of its charter, constitution, and by-laws. *Haden vs. Farmers & Mechanics' Fire Ins. Co.*, 497.
2. **WHEN LIABILITY OF MEMBERS CEASES.**—Where in a mutual company a member has paid his proportion of existing losses and assessments levied, and has withdrawn and surrendered his policy, he is not liable for an existing deficiency not discovered until after his withdrawal. *Union Mut. Fire Ins. Co. vs. Spaulding*, 846.

See AGENT 6; BENEVOLENT ASSOCIATION; UNAUTHORIZED INSURANCE 1.

NAVIGATION. See SEAWORTHINESS 2; STATUTE.

NEGLECTENCE.

1. **LIMITED LIABILITY ACT—KNOWLEDGE OF WRECKING MASTER.**—The act limiting the liability of the owners of vessels applies to a vessel in a wrecked condition, though she be incapable of self-propulsion, or of carrying a cargo.

The "knowledge and privity" of the wrecking master of an insurance company is not the knowledge and privity of the corporation so far as to charge it with responsibility for his negligence beyond the value of the vessel. *Craig vs. Continental Ins. Co.*, 459.

2. **WHEN LIABLE FOR—WHAT CONSTITUTES.**—In the absence of an express stipulation in the policy, the underwriter is liable for losses resulting from negligence not amounting to barratry.

The violation of a statutory obligation, or a proved neglect to conform to the requirements of good seamanship, followed immediately by a disaster, raises the presumption that such neglect caused or contributed to it. This rule applies as well to actions upon policies of insurance as to actions for negligence.

A steamer provided with a defective compass, while running, in violation of law, at full speed in a fog, stranded upon a well-known reef. *Held*, That the violation of law and the unseaworthiness of the steamer raised the presumption that the stranding was the consequence of negligence and unseaworthiness, and were the proximate causes thereof. *Richelieu & O. Nav. Co. vs. Boston Mar. Ins. Co.*, 321.

See ABANDONMENT 1, 2; SUBROGATION.

NOTICE.

1. **DUE DILIGENCE.**—What is due diligence in complying with a provision requiring notice of loss forthwith, is a question of fact for the jury. *Griffey vs. N. Y. Cent. Ins. Co.*, 198.

See PROOFS OF LOSS; ASSESSMENT 1, 3; DESCRIPTION 9.

OCCUPIED. See VACANT.

OCCUPATION. See USE.

OIL. See KEEPING.

ORAL CONTRACT. See CONTRACT; PAROL CONTRACT.

OTHER INSURANCE.

1. **VERBAL CONSENT NOT A WAIVER.**—Verbal consent by the agent of an insurance company, with knowledge that it will be noted upon, is a waiver of the requirement that the consent to additional insurance shall be expressed in writing upon the policy. The evidence of such consent held insufficient to bind the company. *New Orleans Ins. Ass'n vs. Griffin & Shook*, 303.
2. **JOINT AGREEMENT FOR—APPORTIONMENT—RIGHT OF ACTION.**—The agents of the four companies signed an agreement addressed to the insured as follows: "We hereby agree to bind from date twelve thousand dollars of insurance on woolen mill, * * in the North British and Mercantile, Commercial Union,

Guardian, and Phoenix of London Insurance Companies at 3 per cent." The companies had no business relations with each other, nor had the agents authority to act except each for his own company.

Held, That the insured could not also claim a policy which had been prepared in a fifth company for a portion of the loss by the agents, but had not been delivered.

Held, That the risk was to be equally divided between the companies, and each was liable under a separate policy for one-fourth of the amount.

Held, That the right to receive payment accrued upon the refusal of the companies to issue policies or accept proofs. *Fitton and Wife vs. Phoenix Assurance Co.*, 539.

3. NOTICE TO AGENT.—The policy required notice from the insured in case of other insurance, but no particular form of notice was required. The policy was procured by the agent of another company, who informed the agent of defendant that he also had a policy in his own company.

Held, That this was sufficient notice of other insurance, the agent acted for the insured in procuring the insurance. *Union Ins. Co. vs. Murphy*, 548.

4. EVIDENCE OF AGENT'S KNOWLEDGE.—BY MORTGAGEE—ADJUSTMENT A WAIVER.—Evidence to show knowledge on the part of an alleged agent of the insured of other insurance was rightly excluded where no agency had been shown to exist.

The policy provided that if the insured should have or afterwards make another contract of insurance, whether valid or not, it should be void.

Held, That insurance procured by a mortgagee on the interest of the insured, without the knowledge of the latter, in conformity with a mortgage clause, was not other insurance within the meaning of the policy.

Held, That where after knowledge of such other insurance the company without dissent proceeds to adjust the loss, this is a waiver of the alleged forfeiture. *Carpenter vs. Continental Ins. Co.*, 667.

5. INVALID POLICY.—A provision that other insurance procured without consent, whether valid or not, shall render the policy void, is violated by procuring another policy without consent, though such policy be also invalid according to its terms by reason of other subsisting insurance. *Phoenix Fire Ins. Co. vs. Lamar*, 686.

See ACTION 2; CARRIER 2; REPLACEMENT 1.

OVERINSURANCE. See PREMIUM 8.

OWNER. See TITLE; FUND; INSURANCE MONEY.

PAROL CONTRACT. See ACTION 5; CONTRACT.

PAROL EVIDENCE. See EVIDENCE; PREMIUM 9; TITLE 3; USE 1.

PART OWNER. See ABANDONMENT 2.

PARTNER. See TITLE 2.

PAYMENT. See PREMIUM.

PLEADING.

1. EVIDENCE OF TITLE.—The policy sued on, in terms, only extended or attached to such personal property as was owned by the insured, there being no insurance on property on storage. Plaintiff pleaded that the property destroyed belonged to it. Defendant pleaded a general denial. *Held*: This put the question of ownership in issue, and proof that the property destroyed did not belong to plaintiff was admissible. *Queen Ins. Co. vs. Jefferson Ice Co.*, 109.

2. ALLEGATION OF TITLE AND PAYMENT OF PREMIUM.—The policy is prima facie evidence of the ownership of insured, and such ownership need not be alleged in the petition where the policy is made a part thereof; if such ownership does not exist, it is a matter of defense.

Where it is alleged that the policy was issued in consideration of the covenants performed, and the policy avers payment of premium, this is sufficient allegation of consideration.

It is sufficient allegation of demand of payment to allege that "plaintiff would not pay said sum or any part thereof." *Western Horse etc. Ins. Co. vs. Shedd*, 204.

3. **INJUNCTION—FAILURE OF DEFENSE—IGNORANCE.**—Where a defendant in an execution has had a trial, and has failed to make a defense which he might have made under the pleadings in the cause, he cannot after judgment duly entered seek relief by an injunction staying the collection thereof, unless prevented from making the defense on the trial by the action of the plaintiff. Ignorance of the defendant will afford no relief, if that ignorance resulted from neglect in not taking proper steps to obtain information. *Lebanon Mutual Ins. Co. vs. Erb*, 525.

4. **FILING OF POLICY.**—The copying of the policy and application in the transcript immediately after the complaint is a sufficient filing of a copy with the complaint. *Northwestern Mut. Life Ins. Co. vs. Hazell*, 344.

See PROOFS OF DEATH 2; UNAUTHORIZED INSURANCE 3; ACTION; EVIDENCE; PRACTICE.

POLICY.

1. **RIGHT TO COMMUTED—NON-PAYMENT OF INTEREST ON PREMIUM NOTE—RIGHT TO DIVIDENDS.**—Plaintiff's intestate took an endowment policy in defendant company in which it was provided that if after the payment of two or more annual premiums default should be made of any subsequent premium the assured should be entitled to a paid-up policy for as many tenth parts of the original policy as annual premiums had been paid; the premiums were paid part in cash and part in notes, and it was provided in the policy that if the assured should not pay the interest in advance each year on the said notes, then the policy should cease and determine. The assured paid four annual premiums, and then claimed a paid-up policy for four-tenths of the original policy; the company resisted, claiming the assured must pay the interest on his premium notes each year until the maturity of the policy, in order to be entitled to such paid-up policy; *Held*, That the plaintiff was entitled to a paid-up policy for four-tenths of the original policy.

A life insurance policy was described in the margin as a "non-forfeiture endowment policy with profits," but the policy was silent as to the meaning of the term "with profits;" the agent represented to the assured that the profits to which he would be entitled would come by the way of dividends which would be payable after four annual premiums had been paid, and that if he took a paid-up policy the dividends would be applied when he took such policy; *Held*, That the question was not what the company ought to have earned, but what in fact it did earn, that the company was bound to so conduct its business as to preserve its solvency; that it was warranted in changing from the percentage to the contribution plan, if that would best subserve the interest of all classes, and that assured was entitled to dividends under that plan. *Bruce vs. Continental Life Ins. Co.*, 261.

2. **CHANGE OF INSURED—WHOSE INTEREST SHOULD BE COVERED—APPLICATION OF INSURANCE MONEY BY MORTGAGEES.**—A company may safely deal with parties procuring an insurance upon the interest of others which is made payable to such parties where they hold the policy, and is justified at their request and upon their production of the policy in erasing the names of the original insured, and substituting those of others.

But where the legal title is held by one party as the representative of several interests, the interest of such party is the one which should properly be covered.

A party cannot complain of an alteration made in a policy with his consent, and which worked no harm to him; but an alteration made in a contract under which plaintiff claims without his consent, and while out of his hands, is of no effect.

The mortgagees empowered to receive the insurance moneys are responsible for their application to the mortgage debt. *Martin vs. Tradesmen's Ins. Co.*, 371.

See APPLICATION; TITLE; OTHER INSURANCE 5; PLEADING 4.

POSSESSION. See TITLE.

PRACTICE.

1. EVIDENCE—FRAUD.—Where the fire was admitted not to be wrongful, the refusal to permit the repetition of questions in a slightly different shape which had already been answered, and which could only be material on the assumption of a fraudulent fire, was not error. *Simon vs. Home Ins. Co.*, 553.
 2. EVIDENCE—REFRESHING MEMORY—SPECIAL FINDING.—The insured as a witness may refresh her memory by reference to the schedule attached to the proofs of loss made up from actual knowledge, where the items are numerous.
- A request for special finding as to want of information concerning the risk on the part of the company was properly refused where such information was not material to the issue. *Wise vs. Phoenix Fire Ins. Co.*, 707.

See ACTION; PLEADING; EVIDENCE.

PRELIMINARY CONTRACT. See CONTRACT 1.

PREMIUM.

1. PRESUMPTION OF CREDIT.—The delivery of the policy without payment of premium raises a presumption that credit was intended, but in such case offer to return a premium is unnecessary. *Von Wein vs. Scottish Union Ins. Co.*, 158.
 2. ALLEGATION OF NON-PAYMENT—SEPARATION OF TONTINE FUND—EFFECT OF REPRESENTATIONS.—A provision requiring the premiums to be promptly paid, under condition of forfeiture, is lawful, and without the allegation of performance or its equivalent no good cause of action will exist against the company. The alleged non-performance of certain independent conditions by the company, is not equivalent to an alleged performance by the insured or an excuse for non-performance, except when such non-performance by the company is a condition precedent, or when it wholly refuses, or is disabled from performing.
- Alleged neglect on the part of the company to keep separate and invest funds which were subsequently to be returned in dividends according to a stipulation in the policy, is no excuse for a refusal to pay the stipulated premiums.
- A Tontine fund, from its very nature, cannot be separately kept and invested in respect to the interests of each individual member. It is enough that the respective rights and interests of the members are kept account of, and separation of the funds is not essential to this end. The insured is only entitled to an accounting at the end of the Tontine period.
- Alleged representations prior to the issue of the policy and not of the nature of a warranty or of a valid contract will not excuse non-payment of premium. *Bogardus vs. New York Life Ins. Co.*, 175.
3. PAYMENT TO BROKER.—Where the premium was paid by the insured to the broker, who had applied through a regular agent for the policy, and the policy was sent by the agent countersigned by him as required to the broker, and by him delivered to the insured, the company cannot allege the non-receipt of premium, and set up a provision in the policy that it should not be valid until the premium had been received at its office. The doctrine of estoppel applies. *Universal Fire Ins. Co. vs. Block*, 219.
 4. ORDERS ON A RAILROAD AS PAYMENT.—Orders on a railroad company were accepted in lieu of cash for the premium. One of the orders was paid, but the other, through a mistake of the railroad representative, was not honored.
- Held, That a binding receipt acknowledging the premium evidenced that the orders were accepted as cash, and the failure to collect one of them did not

defeat the policy, where the company neglected to notify the insured of its dishonor. *National Benefit Association vs. Jackson*, 229.

5. **RESCISSION OF CONTRACT AND RECOVERY BACK—NATURE OF ACTION—FORFEITURE FOR NON-PAYMENT—INTEREST.**—A policy of insurance was issued by a company to A on the life of her husband. She paid the premiums on the same in quarterly payments for ten years, when the company refused to receive a certain premium and declared the policy void on the ground that said premium was not tendered for several days after the time stipulated in the policy, and that the latter had, therefore, become forfeit to the company. Upon the company's refusal to return her premiums, A brought assumpsit against them, on the rescission of the policy, to recover premiums paid on a count for money had and received. At the trial A offered to read the policy in evidence, but the court excluded it, upon objection by defendants that it was an instrument under seal and the action was assumpsit. A verdict was rendered for the plaintiff and judgment entered thereon. Whereupon the company took a writ of error. *Held*, that the judgment should be affirmed.

Assumpsit for money had and received was the proper form of action.

The action was not on the policy, but was in direct disaffirmance thereof. It was error, therefore, to refuse to admit it in evidence; but this having been done at the instance of the defendants, they could not complain.

- If the policy contained a clause according to which, by reason of the non-payment of the premium on or before the day it was tendered, the policy became forfeited, A could not recover. But this was not shown, and the proof of it depended, in the first instance at least, on the proper construction of the policy, which the defendants would neither offer in evidence themselves nor allow the plaintiff to offer. As the cause was presented to the court, therefore, defendants declared the policy void without any warrant, and having received A's money under such circumstances and refused to return it on demand, she was entitled to recover it in her action of assumpsit.

It was immaterial that the payment of the premiums was voluntary, upon a valid obligation of A's. The action was not founded on fraud or failure of the original contract, but on a rescission of it, by the defendant's refusal to perform.

There was no error in allowing interest from the date of A's demand for the return of her premiums. *American Life Ins. Co. vs. McAden*, 359.

6. **SICKNESS DOES NOT EXCUSE NON-PAYMENT.**—The insured was duly notified when the premium on his life insurance became due, but prior to the time of payment had become delirious, and afterwards died leaving it unpaid.

Held, That the sickness was not an act of God which excused payment, and a prompt tender by the widow on learning of the non-payment will not save from forfeiture. *Carpenter vs. Centennial Life Ass'n*, 455.

7. **PAYMENT TO AGENT.**—A, being a fire insurance agent at Driftwood, in April, 1883, received the application and premium of B for a policy of insurance. A forwarded the application to C, the Philadelphia agent of D (a company), C signed a policy as agent and had his clerk mail it to A for B. It had been the practice of A in business transactions with C on delivering policies, for C to hold the money received until the beginning of the following month, when a statement would be made up and A would send the amount in hand to C; the same custom prevailed between C and D; in accordance with this custom, the money handed by B to A was not at once paid over to C, but was put in the account, being charged to A and credited to C. On May 3, 1883, the property insured was destroyed by fire; on May 5, 1883, A remitted to C his check and notified him of the loss; May 9, 1883, C returned the check to A by mail. A then sent the amount to C in gold, C returned the money by express in a plain envelope, which not being lifted remained in the express office. In an action on the policy D defended, alleging that a condition in the policy, which read as follows: "No insurance, whether original or continued, shall be considered as binding until the actual cash payment of the premium" had

been complied with. *Held*, to be no defense under the circumstances. *Riley vs. Commonwealth Mut. Fire Ins. Co.*, 486.

8. RECOVERY BACK OF PRO-RATA—OVERINSURANCE OF PART OWNER.—Where a marine policy provided, that if on the passage at the end of the term, the risk should continue at pro-rata premium until twenty-four hours after arrival in port, an action by the underwriter will lie to recover such pro-rata, though the premium note given for the original premium had already been sued on and gone to judgment.

It is no defense against such action that the insured was only part owner and had overinsurance of his interest in other companies. where the insurance is on the ship, and not simply on the insured's interest, and it does not appear that there was overinsurance of all interests. *Ins. Co. of North America vs. Rogers*, 631.

9. ABSENCE OF AGENT AS AN EXCUSE FOR NON-PAYMENT—PAROL EVIDENCE OF AGENT'S STATEMENTS.—A policy exempting the company from liability while the insured is in default upon any premium, is valid unless he can show that the default was caused by conduct of the insurer, as where the insurer failed to provide an agent in the State to whom the premium could be paid.

Parol evidence is admissible where the entire contract is not reduced to writing. Parol evidence of statements made by the agent of the company as to the place of payment (the policy being silent on the subject) are admissible. *Blackerby vs. Continental Ins. Co.*, 756.

10. RECEIPT AS EVIDENCE OF PAYMENT—EVIDENCE OF PROFITS—PREMIUM NOTE.—The question being whether the plaintiff had paid a premium, and the defendant having issued a receipt for the same by order of a court of equity in New Hampshire; *Held*, That the receipt was sufficient proof of payment, and therefore, that it was immaterial whether the record of the proceedings in said court was properly authenticated or not.

A policy, indorsed with the words "with profits," is sufficient proof that the plaintiff is entitled to profits, and the admission of other evidence to show the same fact, if error, was harmless.

The company is entitled to deduct an unpaid premium note from the amount of the policy. *Currier vs. Continental Ins. Co.*, 821.

11. NON-PAYMENT AVOIDS CONTRACT FOR RENEWAL WITH AGENT.—Where the policy stipulated that it should be continued, provided the premium was paid and indorsed or a receipt given; also that the company should not be liable by virtue of any renewal unless the premium was paid, a mere casual conversation with the agent, requesting him to renew it at a subsequent date, but which contemplated further action, and where no premium was paid or credit agreed upon, was not a valid renewal. *O'Reilly vs. Corporation of the London Assurance*, 830.

12. ORDER AS PAYMENT—RIGHT OF BENEFICIARY.—Orders drawn on the paymaster of a railroad were given and accepted for the premiums. At the bottom of the orders was written: "If this order is not paid, then all my rights in said association are thereby forfeited." Payment of the order was refused by the paymaster and afterwards by the insured.

Held, That the acceptance of the order operated as a payment where the certificate acknowledged payment and recited that it should be incontestable.

Held, That though the stipulation on the order might result in forfeiting any rights of the applicant, it did not affect the right to recover of a beneficiary in whom such right had become vested through the issue of the certificate. *Cline vs. National Benefit Association*, 859.

See APPLICATION 2; ASSESSMENT; CANCELLATION 3; PLEADING 2; WARRANTY; WIFE'S POLICY 3, 5, 8, 9.

PREMIUM NOTE.

1. CANCELLATION IN CASE OF NON-PAYMENT.—The note given for payment of premium was not paid until after the loss. The policy provided that in case of non-payment at maturity the company should have the right to cancel.

Held, That the company must exercise its option to cancel in order to terminate the policy for non-payment of the note.

Held, That where the policy had not been thus canceled, the fact that the note was only paid after the loss, and without notifying of the loss, would not affect the liability. *Western Horse Co. vs. Sheidle*, 204.

2. NON-PAYMENT OF INTEREST.—The policy provided that by the failure to pay any notes given for premiums, all liability for the sum insured should cease "except as hereinafter provided;" also, that in case of default in paying any premium when due the company would convert the policy into a paid-up policy for as many tenths as there have been complete annual premiums paid. Default was made and an indorsement was made on this policy that it was binding for a commuted amount subject to its terms. The policy further provided that upon failure to pay interest when due on premium notes, the policy should cease and the company should not be liable for the payment of the sum insured, or any part thereof.

Held, That failure to pay the interest when due worked an entire forfeiture. *Holman vs. Continental Life Ins. Co.*, 801.

3. ASSESSMENT BY RECEIVER.—In collecting assessments upon premium notes held by an insurance company, under the act of July 26th, 1842, it is not sufficient, in order to authorize execution, merely to file an affidavit by the receiver that the statement annexed is copied from the books of the company, without alleging that it is true, and without giving in detail the losses. The oath should be made by the treasurer in the absence of any evidence to show his death or refusal to swear. *Barker vs. Beeber*, 837.

See POLICY 1.

PROHIBITED RISK. See KEEPING.

PROOFS OF DEATH.

1. EVIDENCE—BURDEN OF PROOF.—Useless proof of a thing already satisfactorily proved, even if it be erroneously admitted, is not of itself ground of reversal.

The burden of proving a death is primarily on the plaintiff, but where the company was notified, and instead of sending instructions as to proofs, as requested, claimed that deceased was not a member, this was a waiver of proof.

Held, That the by-laws requiring such instructions to be sent upon notice of death was admissible as evidence. *Covenant Mut. Ben. Ass'n vs. Spies*, 144.

2. PLEADING—AVERMENT OF DEATH—EVIDENCE OF BREACH OF WARRANTY.—An averment of notice and proofs, according to the requirement of the certificate, is sufficient.

An averment of death from apoplexy caused by bodily injuries due to a fall is sufficient averment of death from bodily injuries of which there is some visible sign, and not from disease, where the particular facts are detailed.

The burden of proof in case of alleged breach of warranty in the application is on the company. *National Benefit Association vs. Grauman*, 695.

PROOFS OF LOSS.

1. WHAT EVIDENCE IS ADMISSIBLE—TITLE—STATEMENTS AND EXAMINATION BY AGENT.—Evidence that the insured presented a list of the articles destroyed, and the value of each article, to the agent of the company, which was examined by him and returned without objection or requiring any further proof, and that the agent at the same time compelled plaintiff to submit privately to a full examination under oath as to the particulars of the loss, and reduced the same to writing, and expressed himself satisfied therewith, and carried the same away and kept it until the trial; *Held*, admissible, although such facts were not pleaded as a waiver or estoppel.

In such a case, evidence is admissible to show that in reducing the examination of the insured to writing, by mistake or fraud she was represented not to be the owner of the property destroyed, and to correct such statement without pleading the mistake or fraud.

The statement made by the agent of the insurer to the husband of the insured as to what the company would do in regard to the loss, *Held*, admissible to show that the insurer denied any liability and refused to pay the loss, and that the necessity of formal proofs of loss was dispensed with.

Presentation to the agent of the insurer of a list of the articles destroyed, with the value of each, and the examination and retention thereof by the agent, followed by an examination under oath of the insured, taken in writing and carried away as satisfactory by the agent, will amount to a waiver of any further proofs of loss, and a waiver of any defects therein. *Zielke vs. London Assurance Corporation*, 62.

2. **WAIVER OF—AGENCY OF HUSBAND.**—A waiver is an intentional relinquishment of a known right; thus, when the company's special agent sent to adjust the loss, declared: "That the claim was worthless, and that the loss would not be paid, because he burned the property," but the referee found that the agent did not intend to waive the proof of loss, that the plaintiffs did not understand that they were waived, and were not misled as to furnishing such proofs, it was held that there was no waiver.

But, where the property destroyed was owned by a married woman, and her husband signed and swore to the proof of loss as her agent, and on objection by the company to such proof he offered, if the company would return the proof received, to have it corrected and executed by his wife, and thereupon the defendant refused to return it for amendment, or to specify other defects, it was held that such conduct ought to be accounted a waiver, or an estoppel.

Under the conditions of this policy, and the facts that the husband procured and paid for the insurance, as his wife's agent, that he as such agent transacted all the business connected with the purchase and management of the property insured, and that his wife had no personal knowledge as to the property, the court think the proof of loss, though executed by such agent, was sufficient. *John G. Findelsen & Wife vs. Metropole Fire Ins. Co.*, 90.

3. **REASONABLE TIME.**—What is a reasonable time for furnishing proofs, is ordinarily a question of law for the court when the facts are ascertained, but where they are in dispute it is for the jury under proper instructions.

If the plaintiff was physically unable sooner to comply with the requirements of the company, proofs would be in time if prepared as soon thereafter as he was able. *American Fire Ins. Co. vs. Hazen*, 114.

4. **WAIVER OF.**—Where the company claimed that no proofs of loss had been furnished, and the insured answered that such proofs had been waived, the company, on motion, is entitled to have it specifically stated whether the waiver was oral or written, and by whom made. *Webster vs. Continental Ins. Co. of New York*, 148.

5. **EFFECT OF SIXTY DAYS CLAUSE.**—Where the policy provides that the loss shall be payable sixty days after notice and proofs are furnished, and also authorizes an extension of time until after certain proofs, certificates, etc. are furnished, the insurer is not entitled to an additional sixty days after furnishing the latter. *Clover vs. Greenwich Ins. Co.*, 214.

6. **CERTIFICATE OF PUBLIC OFFICER.**—A company has no right to require a public officer, such as a fire marshal, to certify to the correctness of proofs of loss, and such certificate is not essential to recovery. *Universal Fire Ins. Co. vs. Block*, 219.

7. **AS EVIDENCE.**—In an action upon a policy of insurance, to recover damages for loss by fire, the preliminary proofs may be admitted in evidence solely

for the purpose of showing the performance of a condition precedent to the right of action.

Being in writing, the question of their sufficiency for that purpose is to be decided by the court.

It is error to permit such papers to be sent out with the jury to be examined by them in their deliberations. *Kittanning Ins. Co. vs. O'Neil*, 309.

3. PROTEST AS EVIDENCE.—In an action upon a policy of marine insurance, the protest, a copy of which was served with the proofs of loss as the basis of the plaintiff's claim for the sum insured, was held admissible on behalf of the defendant.

The fact that such protest is not actually attached to the proofs of loss is immaterial, if it is referred to and described therein so that it may be identified.

Statements of the master made at the time the notary was reducing the protest to writing, explanatory of certain words used therein, are admissible as part of the *res gestæ*. *Richelieu & O. Nav. Co. vs. Boston Marine Ins. Co.*, 321.

9. EVIDENCE OF MEASURE OF DAMAGES.—The answer denied that the plaintiffs sustained an actual loss exceeding four thousand dollars.

Held, That this was not an admission that the loss amounted to that sum.

It was denied that proofs of loss were made and thereupon copies of the proofs were without objection placed in evidence to show that they were so made.

Held, That proofs so admitted for one specific purpose cannot be claimed as proving also the actual loss and amount thereof on the trial.

Held, That where the loss and its amount is not proven on the trial a nonsuit should be ordered. *Hiles et al. vs. Hanover Fire Ins. Co.*, 443.

10. WAIVER OF.—A denial of liability and refusal of payment is a waiver of proofs of loss. *Karibo vs. Ins. Co. of North America*, 478.

11. FRAUDULENT INVENTORY.—It was the duty of the assured to supply the defendant with an honest inventory of the property damaged, and although he could properly employ his wife to make the inventory of household goods destroyed, if he makes oath to one thus made by his wife containing false statements and fraudulent claims, without knowing of its false claim and without scrutiny, he thereby adopts and makes the fraud his own and cannot recover. *Mullin vs. Ft. Mut. F. Ins. Co.*, 562.

*See ACTION 3; MEASURE OF DAMAGE.

PROTEST. See PROOFS OF LOSS 8.

RECEIVER. See FRAUD 2; INSOLVENCY 1; PREMIUM NOTE 3.

REFORMATION.

BENEVOLENT SOCIETY—CHANGE OF BENEFICIARY.—A certificate of membership in a mutual relief association may be reformed after the death of the member by inserting the name of the beneficiary, when it appears that the secretary of the association and the assured both understood, at the time of the application, that the proposed name should be entered upon the record without further direction. *Scott vs. Provident Mut. Relief Ass'n*, 850.

See ACTION 1.

REINSURANCE.

1. RIGHT OF ACTION.—A was insured in the Standard Fire Office of London, and that company, desiring to withdraw from business in the United States, sold and turned over to the Phenix Insurance Company its entire business, and the good will of that business in the United States, together with a large amount of bonds and other property; in consideration of which the Phenix Company "reinsured all the risks" of the Standard Company upon property situated in the United States, and

agreed that all losses arising under the policies of the Standard Company on such property, after the date of the contract, should be "borne, paid, and satisfied" by said Phenix Company. *Held*, That A might maintain an action against the Phenix Company to recover a loss on the property covered by his policy in the Standard Company. *Johannes vs. Phenix Ins. Co.*, 448.

2. OBLIGATIONS OF ORIGINAL INSURER IN CASE OF ACTION AGAINST. - The plaintiff was an original insurer, and the defendant its reinsurer, against a certain risk by fire; upon the destruction of the insured property the two companies determined that no liability to pay the loss attached, and agreed that the action brought to recover the loss should be defended. For that purpose the original insurer was authorized to act as agent of the reinsurer in making its defense. *Held*, That in the exercise of its authority it was bound to defend the action until the question of liability was determined; and that it could not compromise and settle the claim so as to bind the reinsurer, unless the latter had knowledge of the compromise, and consented to or approved of it.

Where one is bound to protect another from liability, he is bound by the result of a litigation to which such other was a party; provided he had notice of the litigation, and opportunity to control and manage it, and the same was conducted in a reasonable manner; and without fraud or collusion. *Commercial Assurance Co. vs. American Central Ins. Co.*, 542.

REMOVAL. See MEASURE OF DAMAGE.

RENEWAL. See PREMIUM 11.

REPAIRS. See ABANDONMENT 1; MORTGAGE.

REPLACEMENT.

1. LIABILITY IN CASE OF OTHER INSURANCE—CONTRIBUTION—BUILDING CONTRACT. A policy of insurance on a building against loss or damage by fire, reserved to the insurer the right to repair or rebuild upon giving notice of such intention within ninety days after proof of loss. After such proof the insurer served notice of its intention to rebuild, "acting jointly with other insurance companies claiming to be interested." At the time of the fire and of this notice, there were ten separate policies, in as many different companies, upon the same building; eight of which served like notices, severally signed by the companies serving them. Before the time expired to rebuild, but while the insurers were taking steps for that purpose, the plaintiff compromised and settled with all said companies electing to rebuild, except defendant, and released each of them from all liability, receiving for such release an amount of money in the aggregate much less than the amount of these policies. The defendant's policy had this condition: "In no case shall the claim be for a greater sum than the actual damages to or cash value of the property at the time of the fire; nor shall the assured be entitled to recover of this company in a greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, whether such other insurance be by specific, or by general or floating policies, and without reference to the solvency or liability of other insurance."

Held. That the liability of the defendant on its policy as a money indemnity for loss or damage by fire was by above-quoted condition in its policy several and not joint.

That the service by defendant of notice of its intention to rebuild, acting jointly with the other companies, having like concurrent insurance, and serving like notices, converted the respective policies from contracts for a money indemnity into contracts of indemnity payable in repairing or rebuilding, to be performed in the time named in the policy, but if no time is specified, then within a reasonable time.

Upon such conversion by the election of the insurers, their liability for failure to rebuild is several and not joint, unless this several liability was by

agreement with plaintiff converted into a joint liability. The service of the notices did not operate to change the terms of this policy. Hence, the plaintiff may recover on this policy such share of the whole damage as the sum insured bears to the whole amount insured without reference to the solvency or liability of other insurance.

That after the policy had been thus converted into a building contract, the insured might settle and compromise with any of the companies thus bound to rebuild, without releasing the others from such proportionate share of such loss as their policies bore to the aggregate insurance.

That in ascertaining the defendant's proportionate share of the entire loss reference must be had to the aggregate insurance, without regard to the fact that some of the companies had been settled with for a less sum than they were liable for, or that others did not elect to rebuild, or were insolvent, or not liable. *Good vs. Buckeye Mut. Fire Ins. Co.*, 3.

2. PROHIBITION BY CITY AUTHORITIES—MEASURE OF LIABILITY.—The company elected to repair and commenced on the work, but under an ordinance existing at the inception of the policy, the city authorities forbade the repairs to be completed with wood. The insured still refused to accept the sum offered as pecuniary damages, and after a prolonged delay completed the repairs with brick.

Held, That upon exercising its election the company was bound to repair regardless of cost, or pay damages for its failure. The contract of insurance was made subject to the risk of interference by the authorities.

Held, That the obligation to repair was not necessarily confined to the specific material previously used.

Held, That the company was liable for the cost of repairing with brick and for damages resulting from loss of rent through the delay. *Fire Ass'n of Phila. vs. Rosenhal*, 656.

See CONTRIBUTION 2; MEASURE OF DAMAGE; MORTGAGE 2.

REPRESENTATION. See AGENT 3; APPLICATION; FRAUD; MORTGAGE 1; PREMIUM 2; TONTINE.

RESCISSION. See PREMIUM 5.

RISK.

1. INCREASE OF FROM ADJACENT BUILDING.—This policy contained the following condition: "If, during the insurance, any alteration be made on the premises, buildings erected, or changes made in the use or occupation of the same or neighboring premises, or otherwise, whereby the risk or hazard is increased, so as to increase the rate of insurance, it shall be the duty of the insured to give notice thereof to the secretary, pay the additional premium, and obtain the consent of the company thereto in writing, otherwise the insured shall not be entitled to recover for any loss or damage by fire originating in consequence of such change." A tenant of the insured erected a frame building about fifty feet from the buildings of the assured. *Held*, That this did not avoid the policy. *Lebanon Mut. Ins. Co. vs. Loach*, 104.

2. YACHT NOT INSURED BY CARGO POLICY.—A yacht was insured by an agent who had no authority to insure hulls under a short certificate which referred to an open policy. The latter proved to be a cargo blank filled in, and contained no appropriate language covering a vessel's hull.

Held, That the insurance was invalid, the insured should have examined his contract. *Barry vs. Boston Marine Ins. Co.*, 789.

See KEEPING; USE; VACANT.

SALE. See TITLE.

SEAWORTHINESS.

1. **AS A DEFENSE AGAINST EXPENSE OF SUIT UNDER BOTTOMRY BOND.**—Certain insurance companies, in conjunction with cargo owners, defended against a claim on a bottomry bond. The cargo was finally released from the claim. Afterwards, on suit brought by the cargo owners against the insurance companies, under the "sue and labor" clause in the policies, to recover the expenses of defending the bottomry suits, the company set up the unseaworthiness of the vessel, which they had not utilized as a defense in the previous suits. It appearing that such a defense would not have availed in the former suits, and that in part, at least, at the time of the former litigation the condition of the vessel was unknown to the companies, and that libelants were not misled in any way by the former assistance of the companies, *Held*, That the companies were not estopped in this litigation from using such a defense, nor was there anything in the above facts to prevent an inquiry in this suit into the question of unseaworthiness.
- The evidence showing that there were facts tending to indicate unseaworthiness, unless explained, and no explanation being offered, *Held*, That as the vessel was unseaworthy when she sailed, the policies of insurance never attached, and cargo owners could not recover of the insurance companies the expenses of defending the former suits. *Cunningham vs. Switzerland Marine Ins. Co.*, 318.
2. **DEFECTIVE COMPASS—KNOWLEDGE OF OWNER.**—A steamer equipped with a defective compass is unseaworthy, and, so far as such unseaworthiness is a defense to the underwriter, it is immaterial whether it is known to the owner or not. *Richelieu & O. Nav. Co. vs. Boston Mar. Ins. Co.*, 321.

SERVICE.

IN CASE OF UNAUTHORIZED COMPANY.—Where a foreign fire insurance company does business in Missouri through an agent, without complying with the requirements of the revised statutes of that State as to the appointment of an agent to receive service of process, process may be served in suits against it upon the agent through whom it transacted its business. *Funk vs. Anglo-American Ins. Co.*, 625.

SICKNESS. See PREMIUM 6.

SPONTANEOUS COMBUSTION. See FIRE.

STATEMENT. See APPLICATION.

STATUTE.

CANADA NAVIGATION LAWS.—A Canadian steamer, navigating Canadian waters, between two Canadian ports, is bound to comply with the statute of Canada with respect to the navigation of her waters; and an American insurance company, carrying a policy upon such steamer, must be held to have contemplated its requirements. *Richelieu & O. Nav. Co. vs. Boston Mar. Ins. Co.*, 321.

STORAGE. See DESCRIPTION 2, 9.

SUBROGATION.

NEGLECT OF RAILROAD—WHEN LESS THAN MEASURE OF DAMAGES.—An insurance company that settles a loss due to the negligence of a railroad, may take an assignment of the claim of the insured against the road, and recover the whole amount of damages thereunder, though in excess of the sum actually paid by itself. *Hustaford Farmers' Mutual Ins. Co. vs. Chicago M. & St. P. Ry. Co.*, 834.

See CARRIER 1, 3; MORTGAGE 5.

SUICIDE.

1. **SANE OR INSANE**—Where a life insurance policy provides that it shall be void in case the assured die by "self-destruction, felonious or otherwise," the proviso includes all cases of voluntary self-destruction, sane or insane. *Wiley vs. Hartford Life & Annuity Ins. Co.*, 135.
2. **WHAT CONSTITUTES**.—A stipulation providing that the policy shall be void if the insured die by his own hand whether sane or insane is a protection to the insurer in case of voluntary and intentional self-destruction, but does not apply to an unintentional death by his own hand, or the result of accident. A death unintentionally resulting from an overdose of whisky is not within the provision.
- A voluntary act whose probable result, on account of an enfeebled condition would be death, is not a violation of the provision, unless intended to have that effect. *N. W. Mut. Life Ins. vs. Haselett*, 344.
3. **EVIDENCE OF—BURDEN OF PROOF**.—The policy required that the proofs of death should contain full and true answers to the questions relating to the life, health, and death, the statements of the physician, responsible acquaintance, and undertaker; also that in case of self-destruction only the net reserve should be paid. In the proofs disease of bladder was stated as cause of death, also that insured had violated no condition of the policy so far as known. In response to a further direction in case of coroner's jury to furnish verdict and all evidence on which it was based, a copy of such verdict and evidence was annexed which on its face showed suicide to be the cause of death, but with a statement that it was not admitted that there had been either such verdict or evidence, and that the copy furnished was only what according to information purported to be such verdict and evidence, the truth of the finding and evidence being also denied.

Held, That the proofs were not prima facie evidence that the insured died by his own hand.

Held, That the burden of showing that death has not resulted from suicide was not shifted upon the plaintiff by the copy of the verdict and evidence. Such copy was not required by the policy and was furnished as a matter of courtesy. *Goldschmidt vs. Mutual Life Ins. Co.*, 585.

SUIT. See **ACTION**.

SURETY. See **AGENT 1**.

SURRENDER. See **WIFE'S POLICY 3, 5, 8, 9**.

TAXATION. See **LICENSE**.

TENANT. See **VACANT 1**.

TENDER. See **MORTGAGEE**.

TIME. See **LIMITATION 1; PROOFS OF LOSS 3, 5**.

TITLE.

1. **TRANSFER AS COLLATERAL**.—The transfer of a policy as collateral security for claims against the insured is not a violation of a prohibition against a transfer or change of title or an assignment of the policy before a loss. *Griffey vs. N. Y. Cent. Ins. Co.*, 193.
 2. **AGREEMENT FOR NEW PARTNER**.—A firm had agreed upon compliance with certain conditions that another party should be received into their business and a new company should be formed, but that no change should take place in the name or character of the firm "until said corporation shall be formed."
- Held*, That a mere compliance with the preliminary conditions by putting in money which was mingled with the capital stock and subject to all its contingencies, even though the party so complying shared in the profits,

where the corporation had not been formed, and no actual transfer of title to the property insured had taken place, was not a change of title or possession within the policy. *London Assurance Corporation vs. Drennon et al.*, 209.

3. **PAROL EVIDENCE—CONTRACT OF SALE.**—Plaintiff agreed in writing to sell realty to defendant, the latter paying part of the purchase money and going into possession. Afterwards, the balance not having been paid as provided, the plaintiff brought ejectment.

Defendant set up a contemporaneous parol contract that the plaintiff should retain a certain existing policy of fire insurance of the premises in his favor as security for the unpaid purchase money, the defendant paying the assessment thereon and the insurance to be for his benefit; that the building was destroyed by fire, and that the neglect of the plaintiff caused the loss of the insurance money, which was sufficient to cover the said unpaid purchase money.

Held, That this was a competent defense to the ejectment; that the proposed evidence did not impinge on the rule against the admission of parol to vary writing; and that it was the duty of plaintiff to take the proper steps to collect the insurance money.

A policy of fire insurance is not avoided by a contract of sale of the insured property; until a conveyance is executed the vendor retains an interest sufficient to sustain an action on the policy in case of loss.

As between him and the vendee, the vendor holds the insurance money as trustee for the vendee. *Parcell vs. Grosser*, 299.

4. **LIFE ESTATE—REVERSIONARY INTEREST.**—R., in an application for fire insurance, represented his interest in the property to be a fee simple and that the property was unincumbered; his interest was in fact a life estate, and another had a reversionary interest in the land which was insignificant in proportion to its whole value, even exclusive of the house proposed to be insured. *Held*:—

The misrepresentations were immaterial, and do not vitiate the policy. *Haden vs. F. & M. F. Ins. Co.*, 497.

5. **KNOWLEDGE OF AGENT.**—Knowledge acquired by the agent concerning the nature of the title, and that foreclosure proceedings were pending six months previous, cannot be alleged as knowledge of the condition of the ownership when acting as agent in issuing the policy. *Stennett vs. Pennsylvania F. Ins. Co.*, 536.

6. **ABSOLUTE INTEREST.**—By absolute interest in an insurance policy is meant an estate in fee simple, not a life estate.

The property was conveyed to the insured as a life estate, and at her death to vest in her children, but in the absence of children was to revert to the grantor.

Held, That the interest of the insured was not absolute, and where the policy provided that in such case it should be forfeited, there could be no recovery. *Davis vs. Iowa State Ins. Co.*, 533.

7. **UNDIVIDED INTEREST.**—Plaintiff, after taking a conveyance for the whole of certain movable property in a building owned by her and giving promissory notes for the same, afterwards entered into a compact before a notary with the seller, in which she accepted from the seller one-fourth part of the same movable property in consideration of debts due, and gave a full acquittance. The business was afterwards managed by a third party in behalf of the plaintiff, but there was no accounting and no purchasing in plaintiff's name.

Held, That the ownership of plaintiff was only an undivided interest, and where the policy provided that it should be void if the title was not a sole ownership, the insurance was forfeited. *Tague vs. Royal Ins. Co. et al.*, 713.

8. **TO INSURANCE MONEY—ASSIGNMENT—INSURABLE INTEREST.**—A mutual aid society issued two certificates of membership or policies on the life of A, amounting to \$5,000; the beneficiaries were B, a stranger, and C, a son of A, but the latter only to the amount of \$200. Eighteen days afterwards B assigned to D, who paid all the costs and fees up to the death of A. After A's death D made a compromise with four of the heirs and also with the widow, who, on payment of an agreed sum, assigned all their interest to D. After payment of these sums, and of \$200 to a minor heir, the society paid the balance of the insurance to D. The administrators then brought suit against D to recover this money.

Held, That B and D had no insurable interest in decedent's life, and that D could only hold the amount which he had expended as fees and costs. And *held*, further, that as one of the heirs was a minor the assignment of the four heirs and the release of the widow was properly rejected as evidence in this suit. That is a matter for the orphans' court. *Ruth vs. Katterman*, 840.

See **ATTACHMENT; BENEFICIARY; INSOLVENCY; MORTGAGE; PLEADING 1, 2; PROOFS OF LOSS 1; WIFE'S POLICY.**

TONTINE.

REPRESENTATIONS OF AGENT—EVIDENCE OF FRAUD—NOT GAMBLING—SEPARATION OF FUND.—Where the authority of the agent as to representations was limited to the written statements in the application, and the plaintiff was aware of this through the policy, and a prospectus was also read to her setting forth the full nature of the Tontine plan, which prospectus was in evidence, further oral representations of the agent were immaterial, and not admissible to show fraudulent representations on the part of the company.

Evidence of failure on the part of the company to carry out the contract is inadmissible under a charge of fraud in the shape of an inducement to enter into it, and evidence of such fraud is inadmissible under charge of failure to carry it out.

No rights accrue under a Tontine contract until the Tontine period has expired.

A Tontine policy is not a gambling contract, and the scheme does not affect the status of a policy as a life insurance contract.

A representation that the surplus from Tontine policies should be set aside, does not require that the moneys received should be separated, but only that a separate account of the same should be kept. *Simons vs. New York Life Insurance Company*, 150.

See **PREMIUM 2.**

TORNADO. See **LIGHTNING 3.**

TOTAL LOSS.

FREE FROM AVERAGE—ABANDONMENT.—Under a marine policy, "free from claim for particular and general average, the plaintiff must show either an actual total loss of the property insured, or a constructive total loss followed by an abandonment. *Burnham vs. Boston Mar. Society*, 291.

See **VALUED POLICY 1, 2.**

ULTRA VIRES.

NO DEFENSE AGAINST INSURANCE CONTRACT.—A corporation cannot avail itself of the defense of ultra vires when the contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract.

A corporation organized for the purpose of insuring against loss by fire is estopped to deny its liability on a contract of insurance against loss by hail, when the same has been fully performed by the insured, who, in

good faith dealt with the company under the belief that it had authority to enter into such contract. *Denver Fire Ins. Co. vs. McClelland*, 721.

UNAUTHORIZED INSURANCE.

1. **WHAT IS A CONTRACT OF INSURANCE—MUTUAL COMPANY.**—A contract by which one party for a consideration promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest, is a contract of insurance, whatever may be the terms of payment of the consideration by the assured, or the mode of estimating or securing payment of the sum to be paid by the insurer in the event of loss.

Upon the facts appearing in the record, *Held*, that defendant was a mutual insurance company, and as such must comply with the provisions of the act of June 1. 1873, and receive the certificate of the auditor of State before transacting business. *State vs. Farmers' etc. Ins. Co.*, 381.

2. **WILL NOT PREVENT RECOVERY.**—Compliance with the statutes of Minnesota on the part of the company is not essential to the recovery from it on account of a loss. *Ganser vs. Fireman's Fund Ins. Co.*, 555.
3. **PLEADING.**—An information under the statute, —No. 46 Sec. 3, Acts of 1884; R. L. Sec. 3,615,—charging an agent with receiving risks for insurance in behalf of a foreign insurance company which has not complied with the statute, is bad on demurrer, unless the name assured is alleged. *State vs. Hover*, 701.

See SERVICE.

USE OR OCCUPATION.

1. **WAIVER OF INCREASE OF RISK—PAROL EVIDENCE.**—In an action on a policy of insurance, the act of the insurer who has knowledge of an increase of risk by a change of use of the insured premises without objecting to the same or canceling the policy, will be construed as a waiver of his right of forfeiture of the contract by reason of such increase of risk.

Parol testimony is admissible to show such waiver, although the policy contained a clause requiring the agreement of the insurer to be indorsed on the policy.

If the insurer, after knowledge of the increase of risk, continues to receive premiums he will be held to have waived the forfeiture.

Positive testimony on a given point must predominate over negative testimony on the same point. *Story vs. Hope Ins. Co.*, 119.

2. **DESCRIPTION—HOTEL.**—A building used in part for a saloon, a resort for prostitutes and where no rooms were set apart for lodgers is not a hotel. *Baker vs. German Fire Insurance Company*, 877.

See DESCRIPTION 8; VACANT 5.

VACANT.

1. **REMOVAL OF TENANT.**—An absolute condition in a fire insurance policy on a dwelling-house that the policy shall be void "if the building insured be vacated or left unoccupied" avoids the policy, although the vacation of the house results from the permanent removal of the tenant of the insured during the running of his lease, without the knowledge or consent of the landlord. *Farmers' Ins. Co. vs. Wells*, 141.
2. **OCCUPIED IN PRESENT.**—Where the policy describes the house insured as "occupied as a family residence," *Held*, a representation or at most a warranty in present, and not a continuing warranty that the house should remain so occupied. *Imperial Fire Ins. Co. etc. vs. Kierman*, 352.
3. **OCCUPANCY IN CARE OF DWELLING.**—The dwelling insured was frequently visited by members of the family for the purpose of looking after the furniture, etc., and generally a servant slept there at night; but no fires were lighted, nor were there any of the usual signs of occupancy.

Held, That this was not an occupancy within the meaning of the policy. *Traders' Ins. Co. vs. Race et al.*, 633.

4. IN CASE OF FACTORY.—*Held*, That where the business of manufacturing had ceased for five months, without evidence of any intention to resume, it had ceased operations within the meaning of the policy. *Tague vs. Royal Ins. Co. et al.*, 713.

5. TEMPORARY—USE OR OCCUPATION—EVIDENCE OF ARSON.—The policy insuring as "occupied by tenant" provided that it should be void in case of any change as to tenants or occupancy without notice.

Held, That the vacancy of the premises for six weeks before the fire was not a violation of the provision.

Held, That the vacancy was not a use for other purposes than those named.

Held, That evidence to prove arson as a defense need not be so strong as required for a criminal conviction. *Somerset County Mutual Fire Ins. Co. vs. Ussaw*, 781.

6. DILIGENCE NO EXCUSE.—Where a policy of insurance contained the condition that if the building should be or become vacant or unoccupied for the purpose indicated, as a dwelling-house, the policy should become void unless consent was given by the underwriters, it was error for the court to make the liability dependent upon the diligence of the assured to keep the building occupied. Such qualification was not contained in the policy. *Niagara Fire Ins. Co. vs. Drda*, 874.

VALUATION.

WHEN NOT FRAUDULENT.—An overestimate of the loss, unless proved to be fraudulent, is not a violation of a policy provision against a fraudulent claim for more than is due. *Stone vs. Hawkeye Ins. Co.*, 490.

See ACTION 2; ARSON 1.

VALUED POLICY.

1. WHAT CONSTITUTES TOTAL LOSS IN CASE OF BUILDING—MEASURE OF DAMAGES.—Where the thing insured is a two-story, frame "building," which is shown to mean a house, and which was used as a hotel, and it was destroyed by fire as to cease to be a "building" within the meaning of the law, the policy evidences a liquidated demand against the insurer for the amount of the policy.

It is unimportant that the building may have been injured by a former fire while covered by other policies which had been paid. Such injury can have no bearing on the question of liability under policies subsequently issued.

Where the building insured was injured to the extent that it could not be repaired by reason of a city ordinance preventing buildings injured to a certain extent from being repaired, the loss was total within the meaning of the policy. *Hamburg-Bremen Fire Ins. Co. vs. Garlington*, 509.

2. LEX LOCI—TOTAL LOSS—STIPULATION AGAINST INVALID.—An insurance company doing business in this State, which consummates a contract of insurance here, and which is contemplated to be executed here, is held to have elected to do business under the terms of our laws and must be governed by them. Under article 2,971, Revised Statutes, therefore, the stipulation in the insurance policy, that in case of total loss by fire of real property insured the insured will bear one-fourth of the loss, is void. and the policy evidences a liquidated demand against the insurer for its full amount. This provision does not apply to personal property. *Queen Ins. Co. vs. Jefferson Ice Co.*, 109.

WAIVER. See AGENT 5; CANCELLATION 3; KEEPING 3; OTHER INSURANCE 1, 4; PROOFS OF LOSS 2, 4, 10; USE 1; WARRANTY.

WARRANTY.

RECEIPT OF PREMIUM A WAIVER.—The receipt of the premium and issue of policy after knowledge by the company of breach of warranty is a waiver of such breach. *Stone vs. Hawkeye Ins. Co.*, 490.

See APPLICATION; REPRESENTATION; PROOFS OF DEATH 2.

WIFE'S POLICY.

1. **ASSIGNMENT BY WIFE—LEX LOCI.**—An indorsement of her name in blank by a wife upon a policy of insurance upon the life of her husband, taken out for her benefit and payable to her or her assigns, with a delivery of the policy to the husband, to enable him to use it as collateral security in obtaining a loan, will be valid and binding in equity in favor of the party making the loan, and the wife will not be permitted to deny the power of the husband to fill up the assignment.

Where the husband, without the authority or knowledge of the wife, filled out the assignment of the policy, not merely as security for the proposed loan, but also as security to a creditor for a pre-existing debt, it was held that the wife was not bound by the latter assignment.

The assignment of such a policy by a wife is valid in this State.

By the laws of New York, where the husband and wife resided, such an assignment was invalid. The policy was issued by an insurance company of this State and the assignant was made in the State of New Jersey, where such assignments were valid. *Held*, That the laws of New York could not operate in the case. *Connecticut Mutual Life Ins. Co. vs. Westervelt*, 74.

2. **ASSIGNMENT OF RIGHTS OF CREDITOR.**—B. took out a policy on his life payable to his wife, on which he had paid \$5,896 in premiums and on which one H. had paid \$357 in premiums at the request of B., of which sum \$1,338 was in excess of \$500 yearly.

Held, That the policy was not assignable and the wife could not be compelled to assign it to a receiver in the suit of one who had recovered a judgment against B. and his wife, nor could the court appropriate the avails as if it had been assignable for the recovery of a debt of B.

Held, That neither the policy nor the proceeds, until it becomes payable, can be reached by a creditor.

Held, That the absence of children does not affect the case.

Held, That the lien of a creditor attaches only to the excess of premiums paid, not to the amount insured.

Held, That the payment of premium in each year constituted a new contract, and subsequent amendatory statutes as to the amount of exemption, relate only to the remedy, and are therefore valid.

Held, That any claim for excess of premiums must be governed by the statutory amount exempted at the time of contracting the debt. *Baron vs. Brummer*, 124.

3. **NON-PAYMENT OF PREMIUM IN CASE OF DIVIDENDS—SURRENDER BY HUSBAND—TENDER OF PREMIUM.**—Where, by the terms of a contract of life insurance, the beneficiary named in the policy is entitled to participate in the profits, a portion of which, in the form of dividends, is to be applied each year in reduction of premiums, and it has been the uniform practice of the company to give timely notice of the amount of premium, amount of dividends, and of the balance to be paid in cash, and the company neglects to give such notice, having knowledge of the residence of the beneficiary, and by reason thereof a premium is not paid at the time specified in the policy, the company cannot set up such failure to pay as a defense to a recovery upon the policy, although by its terms the same is

to be forfeited in case of failure to pay a premium upon any of the dates stipulated therein.

Where, in such case, the company repudiates the contract, and by its course of conduct clearly indicates that a tender of the premium after the death of the insured, if made, would not be accepted, a failure to make such tender will not bar a recovery on the policy.

In such case, where the company has uniformly sent the notices to the insured (the husband of the beneficiary) and he has made payment of premiums from year to year, the law will treat him, in making such payments, as agent for his wife; but where it is shown to the company by letters from the husband very shortly after notice sent, that he and his wife have separated, she having commenced a proceeding for alimony against him, and that he is desirous of having the policy changed and made payable to his estate, the company is not justified in treating him as her agent, for the purposes either of receiving notice for her or of making a surrender of the policy.

And in such case an attempt by the husband, without knowledge of the wife, to surrender the policy to the company is inoperative, and the rights of the wife are not thereby impaired. *Manhattan Life Ins. Co. vs. Smith*, 324.

4. RIGHTS OF CREDITORS.—Judgment creditors had filed a bill to have the proceeds of a policy on the life of the debtor, who was deceased, and which was payable to the wife, applied in satisfaction of their judgment, as having been procured by the application of funds belonging to the creditors. The wife opposed on the ground that under the statutes of the State where the contract was made, no such claim was allowable.

Held, That the company was entitled to pay the money into court to await the settlement of the case, where all the claimants were before the court. *Etna Nat. Bank vs. United States Life Ins. Co.*, 397.

5. ASSIGNMENT BY WIFE—NON-PAYMENT OF PREMIUM, LAPSE AND SURRENDER.—A policy taken out by a wife on the life of her husband in New York, is not assignable, no matter who paid the premiums. It cannot be claimed that because the premiums were paid by the wife out of her separate fund and because no reference is made to the statute, therefore such a policy is assignable at common law.

The wife's policy having lapsed according to its terms for non-payment of premium, she secures no greater rights against the company through having illegally assigned it, and its subsequent surrender by the assignee.

Where it is claimed that a wife's policy was assigned as collateral for a loan to the husband, and that the assignee surrendered it to the company, which thereupon paid a surrender value and canceled it, and that the wife had no power to assign, and that the wife is entitled to the same advantage as if she had never assigned, she cannot recover on the ground of an unlawful conversion.

Held, That the possession of the assignee was lawful until the wife elected to reclaim, and its receipt by the company from the assignee was not a conversion. The rights of the wife failed solely through neglect to tender the premium when due.

Held, That the wife was entitled to recover from the assignee the surrender value received by him less the premiums paid by him, with interest. *Frank vs. Mut. Life Ins. Co.*, 431.

6. RIGHTS OF CREDITORS.—Under the Massachusetts statute in the case of a wife's policy where it is claimed that the contract was made in furtherance of a conspiracy between the husband and wife to cheat the creditors of the former, the most that the creditors can recover is an amount equal to the premiums paid with interest, and an injunction will only lie to restrain the payment of the claim as to such amount. *Inglis vs. New England Mut. Life Ins. Co. et al.*, 557.

7. TITLE TO.—A, who was about to be married to B, offered to have a policy of insurance upon his life taken out in her name. This she declined to ac-

cept if so taken out. A then had the policy issued in his own name, and later married B. The policy was placed with other papers of A and B in a safety box, which A handed to B to give to her mother to keep for her. No actual assignment of the policy was ever made to B, but A a number of times mentioned that the insurance it evidenced had been effected for the benefit of B. A died intestate and without creditors. In a contest between B and certain relatives of A, as to whether the amount due upon the policy belonged to B or to the estate of A, *Held*, That under the circumstances it should be considered the separate property of B. *Appeal of Madeira*, 592.

8. **FRAUDULENT SURRENDER BY HUSBAND—NON-PAYMENT OF PREMIUM.**—The application provided that failure to pay the premium when due should work a forfeiture except as otherwise provided in the policy. The policy provided that it should not be forfeited by reason of failure to pay the premium, but might be continued in force for such term or amount as the reserve would pay for; provided, that unless the policy should be surrendered and the paid-up policy applied for within ninety days after the non-payment, the policy should be void. The policy, which was taken out on the life of the husband by him as attorney for his wife and in her name, was afterwards surrendered by him on the false representation that the wife was dead and a new policy was taken, which afterwards became forfeited through non-payment of premium.

Held, That the fraudulent cancellation of the first policy through the husband did not affect the rights of the wife, but the subsequent non-payment of premium and failure to apply for a paid-up policy worked a complete forfeiture according to its terms. *Knapp vs. Homoeopathic Mutual Life Ins. Co.*, 603.

9. **LAPSE AND SUBSTITUTION—TITLE TO WHEN PREMIUMS PAID BY HUSBAND.**—The premiums on a wife's policy were paid by the wife. Upon her death the husband by an arrangement with the company allowed the policy to lapse, and received in exchange another payable to himself on which he paid the premiums.

Held, That the rights of the wife became vested and could not be avoided by the substitution; the substituted policy stood in the place of the original.

Held, That as the representatives of the wife failed to look after their interests in the original policy and the premiums on the substituted policy were paid by the husband with an intention to benefit thereby without interference by the representative of the wife, the amount of the policy should be divided between the representatives of the husband and wife in proportion to the premiums paid by each. *National Life Ins. Co. vs. Haley*, 611.

10. **RIGHTS OF CREDITOR.**—A wife's policy is her separate property, and under the Georgia code cannot be transferred to a creditor by her to secure her husband's debt, nor will her ratification of the transfer after her husband's death give it validity. *Smith vs. Head*, 709.

11. **INSURABLE INTEREST OF HUSBAND.**—Where no fact is shown as to the wife, as that she was insane, or an invalid, the presumption is that the husband has an insurable interest in her life. *Currier vs. Continental Life Ins. Co.*, 821.

See **BENEVOLENT ASSOCIATION** 3.

WIND. See **LIGHTNING** 3.

WRECKING MASTER. See **ABANDONMENT** 2; **NELIGENCE** 1.

YACHT. See **RISK** 2.

CASES REPORTED.

	PAGE
<i>Ætna National Bank et al. vs. U. S. Life Ins. Co. et al.</i> U. S. C. C., N. Y.....	239
<i>Ætna Nat'l Bank et al. vs. Manhattan Life Ins. Co. et al.</i> U. S. C. C., N. Y.....	235
<i>Ætna Nat'l Bank of Hartford et al. vs. U. S. Life Ins. Co. et al.</i> U. S. C. C., N. Y.....	397
<i>Agnew vs. Grand Lodge A. O. U. W. of Missouri</i> St. Louis C. A.....	232
<i>Alliutt vs. High Court of Foresters</i> Mich. S. C.....	680
<i>American Fire Ins. Co. vs. Hazen & Son</i> Pa. S. C.....	114
<i>American Life Ins. Co. vs. McAden</i> Penn. S. C.....	359
<i>Appeals of Louis C. and Adaline L. Madeira</i> Pa. S. C.....	592
<i>Attorney-General vs. Atlantic Mut. Ins. Co.</i> N. Y. C. A.....	472
<i>Bailey et al. vs. Mutual Benefit Association</i> Iowa S. C.....	793
<i>Barker vs. Beeber, Receiver</i> Pa. S. C.....	837
<i>Baron vs. Brummer et al.</i> N. Y. C. A.....	124
<i>Barry vs. Boston Marine Ins. Co.</i> Mich. S. C.....	789
<i>Barton vs. Provident Mutual Relief Association</i> N. H. S. C.....	785
<i>Bassett vs. Parsons</i> Mass. S. J. C.....	399
<i>Bauer vs. Samson Lodge Knights of Pythias</i> Ind. S. C.....	81
<i>Blackerby vs. Continental Ins. Co.</i> Ky. C. A.....	756
<i>Bogardus vs. New York Life Ins. Co.</i> N. Y. C. A.....	175
<i>Boright vs. Springfield F. & M. Ins. Co.</i> Minn. S. C.....	306
<i>Briggs, Trustee, vs. Earl</i> Mass. S. J. C.....	469
<i>Broadwater et al. vs. Lion Fire Ins. Co.</i> Minn. S. C.....	295
<i>Bruce, Admr., vs. Continental Life Ins. Co.</i> Vt. S. C.....	251
<i>Bryant et al. vs. Charter Oak Life Ins. Co.</i> U. S. C. C., Ill.....	132
<i>Burham vs. Boston Marine Ins. Co.</i> Mass. S. J. C.....	291
<i>Carpenter vs. Centennial Life Ass'n</i> Iowa S. C.....	455
<i>Carpenter vs. Continental Ins. Co.</i> Mich. S. C.....	667
<i>Carrigan vs. Mass. Benefit Ass'n</i> U. S. C. C., Pa.....	30
<i>Chesbrough and Carlton vs. Home Ins. Co.</i> Mich. S. C.....	515
<i>Claffey vs. Hartford Fire Ins. Co.</i> Cal. S. C.....	237
<i>Clover vs. Greenwich Ins. Co. of New York</i> N. Y. C. A.....	214
<i>Commercial Assurance Co. vs. American Central Ins. Co.</i> Cal. S. C.....	542
<i>Conn. Fire Ins. Co. vs. Merchants & Mechanics' Ins. Co.</i> Va. S. C. A.....	615
<i>Connecticut Mutual Life Ins. Co. vs. Bear</i> U. S. C. C., N. C.....	315
<i>Connecticut Mutual Life Ins. Co. vs. Pyle</i> O. S. C.....	261
<i>Conn. Mut. Life Ins. Co. vs. Scammon et al.</i> U. S. S. C.....	415
<i>Continental Ins. Co. vs. Busby</i> Texas C. A.....	736
<i>Continental Life Ins. Co. vs. Carrier</i> Vt. S. C.....	826
<i>Cornett vs. Phenix Ins. Co.</i> Iowa S. C.....	122
<i>Covenant Mut. Ben. Ass'n vs. Spies et al.</i> Ill. S. C.....	144
<i>Craig, Admr. vs. Continental Ins. Co.</i> U. S. C. C., Mich.....	459
<i>Crossley vs. Connecticut Fire Ins. Co.</i> U. S. C. C., Mass.....	619

	PAGE
Outrier vs. Continental Life Ins. Co.	Vt. S. C. 831
Davis vs. Iowa State Ins. Co.	Iowa S. C. 533
Day vs. New England Mut. Life Ins. Co.	Pa. S. C. 744
Denver Fire Ins. Co. vs. McClelland	Cal. S. C. 721
District Grand Lodge No. 5, B'nai B'rith, vs. Jedidjah Lodge No. 7	Md. C. A. 674
Donnelly vs. Cedar Rapids Ins. Co.	Iowa S. C. 696
Dupree vs. Virginia Home Ins. Co.	N. C. S. C. 191
Dwyer vs. Continental Ins. Co.	Tex. S. C. 72
Eaton vs. Supreme Lodge Knights of Honor.	U. S. C. C., Ohio. 763
Edington vs. Etna Life Ins. Co.	N. Y. C. A. 711
Eliot Five Cents Savings Bank vs. Com'l Union Ins. Co.	Mass. S. J. C. 777
Elkhart Mut. Aid, Ben. & Relief Ass'n vs. Houghton.	Ind. S. C. 97
Elliott, Adm'r, et al. vs. Whedbee et al.	N. C. S. C. 815
Ellis vs. State Ins. Co.	Iowa S. C. 481
Elsey vs. Old Fellows Mutual Relief Association.	Mass. S. J. C. 797
Enos vs. Sun Ins. Co.	Cal. S. C. 138
Equitable Assurance Society vs. Brobst.	Neb. S. C. 628
Estate of Rapp vs. Phoenix Ins. Co.	Ill. S. C. 35
Falls of Nense Mfg. Co. et al. vs. Ga. Home Ins. Co.	U. S. C. C., N. C. 303
Farmers' Ins. Co. vs. Wells.	Ohio S. C. 141
Findeisen and Wife vs. Metropole Fire Ins. Co.	Vt. S. C. 90
Fire Association of Philad. lphia vs. Rosenthal.	Pa. S. C. 658
Fittou and Wife vs. Phoenix Assurance Co. and others.	U. S. C. C., Vt. 539
Fitzgerald, Adm'r., vs. Connecticut Fire Ins. Co.	Wis. S. C. 277
Frank vs. Mutual Life Ins. Co. et al.	N. Y. C. A. 434
Funk, Adm'r, vs. Anglo-American Ins. Co.	U. S. C. C., Mo. 625
Ganser vs. Firemen's Fund Ins. Co.	Minn. S. C. 556
Goldschmidt et al. vs. Mutual Life Ins. Co.	N. Y. C. A. 585
Good vs. Buckeye Mut. Fire Ins. Co.	Ohio S. C. 3
Granite State Mutual Aid Ass'n vs. Porter & Dubois.	Vt. S. C. 521
Griffey vs. New York Central Ins. Co.	N. Y. C. A. 198
Haden vs. Farmers & Mechanics' Fire Ins. Co.	Vt. S. C. A. 497
Hamburg-Bremen Fire Ins. Co. vs. Garlington.	Tex. S. C. 509
Hatch vs. New Zealand Ins. Co.	Cal. S. C. 70
Hiles et al. vs. Hanover Fire Ins. Co.	Wis. S. C. 418
Holman vs. Continental Life Ins. Co.	Conn. S. C. 801
Home Mut. Life Ass'n of Penn. vs. Gillespie.	Penn. S. C. 390
Hubbell vs. Pacific Mut. Ins. Co.	N. Y. C. A. 42
Hustisford Farmers' Mut. Ins. Co. vs. Chicago, M. & St. P. Ry. Co.	Wis. S. C. 634
Imperial Fire Ins. Co. etc. vs. Kiernan.	Ky. C. A. 352
Ingles et al. vs. New England Mut. Life Ins. Co. et al.	U. S. C. C., Mass. 557
Ins. Co. of North America vs. Rogers.	Me. S. J. C. 631
Jackson Co. vs. Boylston Mut. Ins. Co.	Mass. S. J. C. 47
Jermain vs. Hendricks.	N. Y. C. A. 473
Johaunes vs. Phenix Ins. Co.	Wis. S. C. 449
Kittanning Ins. Co. vs. O'Neill.	Pa. S. C. 809
Knapp vs. Homeopathic Mut. Life Ins. Co.	U. S. S. C. 603
Knights of Honor vs. Nuirn.	Mich. S. C. 365
La Solidarite Mut. Ben. Ass'n, In re Application of.	Cal. S. C. 394
Lebanon Mutual Ins. Co. vs. Erb.	Pa. S. C. 525
Lebanon Mut. Ins. Co. vs. Losch.	Pa. S. C. 104
Liverpool & London & Globe Ins. Co. vs. Ganther et al.	U. S. S. C. 161
London Assurance Corporation vs. Drennen et al.	U. S. S. C. 209
Manhattan Life Ins. Co. vs. Smith.	O. S. C. 334
Martin et al. vs. Tradesmen's Ins. Co.	N. Y. C. A. 371
Massey et al. vs. Mutual Relief Society.	N. Y. C. A. 604
May vs. Western Assurance Co.	U. S. C. C., Minn. 545
McCarthy et al. Appeal.	Pa. S. C. 551

	PAGE
Mullin vs. Vermont Mut. Fire Ins. Co.	Vt. S. C. 561
Mutual Fire Ins. Co. vs. Wagner	Pa. S. C. 704
Mutual Life Ins. Co. vs. Armstrong, Administratrix ..	U. S. S. C. 427
National Benefit Association vs. Grauman ..	Ind. S. C. 695
National Benefit Association vs. Jackson	Ill. S. C. 229
National Life Ins. Co. vs. Haley et al.	Me. S. J. C. 611
New Orleans Ins. Ass'n vs. Griffin & Shook ..	Tex. S. C. 503
New York Life Ins. Co. vs. Fletcher, Executor ..	U. S. S. C. 401
Northern Ins. Co. vs. Kiernan	Ky. C. A. 352
Northwestern Mut. Life Ins. Co. vs. Hazel-itt ..	Ind. S. C. 344
Northwestern Transportation Co. vs. Thames and Mer-	
sey Ins. Co.	Mich. S. C. 641
Noyes vs. Northwestern Nat. Ins. Co.	Wis. S. C. 57
Olson et al. vs. St. Paul Fire & Marine Ins. Co.	Minn. S. C. 848
O'Reilly vs. Corporation of the London Assurance ..	N. Y. C. A. 830
Packard vs. Dorchester Mut. Fire Ins. Co.	Me. S. J. C. 475
Parcell vs. Grosner	Pa. S. C. 299
Peoria Sugar Refining Co. vs. People's Fire Ins. Co.	U. S. C. C., Conn. 52
Phoenix Ins. Co. vs. Erie & Western Trans. Co.	U. S. S. C. 574
Phoenix Fire Ins. Co. vs. Lamar	Ind. S. C. 686
Pollard vs. Phoenix Ins. Co.	Miss. S. C. 376
Presbyterian Assurance Fund vs. Allen	Ind. S. C. 768
Providence etc. Ins. Co. vs. Adler	Md. C. A. 773
Queen Ins. Co. vs. Jefferson Ice Co.	Texas S. C. 109
Richards vs. Washington F. & M. Ins. Co.	Mich. S. C. 598
Richelieu & O. Nav. Co. vs. Boston Marine Ins. Co.	U. S. C. C., Mich. 321
Riley vs. Commonwealth Mut. Fire Ins. Co.	Pa. S. C. 466
Riley vs. Hartford Life & Annuity Ins. Co.	U. S. C. C., Mo. 135
Royster et al. vs. Roanoke N. & B. S. B. Co. et al.	U. S. C. C., N. C. 843
Ruth vs. Katterman et al.	Pa. S. C. 840
Schuster et al. vs. Dutchess Co. Mut. Ins. Co.	N. Y. C. A. 463
Scott vs. Dickson	Pa. S. C. 22
Scott vs. Provident Mut. Relief Association ..	N. H. S. C. 850
Shelden vs. Heckla Fire Ins. Co.	Wis. S. C. 622
Simon vs. Home Ins. Co.	Mich. S. C. 553
Smith vs. Head	Ga. S. C. 709
Somerset County Mut. Fire Ins. Co. vs. Usaw ..	Pa. S. C. 781
Sperry et al. vs. Springfield F. & M. Ins. Co.	U. S. C. C., Col. 270
State, ex rel. Atty.-Gen., vs. Farmers' etc. Ins. Co.	Neb. S. C. 381
State vs. Hover	Vt. S. C. 701
Stennett vs. Pennsylvania Fire Ins. Co.	Iowa S. C. 536
Stiltz vs. State of Indiana	Ind. S. C. 386
Stone vs. Hawkeye Ins. Co.	Iowa S. C. 490
Story vs. Hope Ins. Co.	La. S. C. 119
Stowe vs. Phinney	Me. S. J. C. 750
Supplee vs. Knights of Birmingham of Pa.	Pa. S. C. 226
Supreme Council Order of Chosen Friends vs. Garrigus ..	Ind. S. C. 284
Supreme Lodge Knights of Honor vs. Morgan ..	U. S. C. C., Ky. 529
Thompson, Receiver, vs. Phoenix Ins. Co.	U. S. C. C., Oreg. 66
Uhlig vs. Williamsburgh City Fire Ins. Co.	N. Y. C. A. 312
Universal Fire Ins. Co. vs. Block	Pa. S. C. 219
Union Ins. Co. vs. Murphy	Pa. S. C. 548
Union Mut. Fire Ins. Co. vs. Spaulding	Mich. S. C. 846
Webster vs. Continental Ins. Co.	Iowa S. C. 148
Western Assurance Co. vs. Towle	Wis. S. C. 241
Western Horse etc. Ins. Co. vs. Sheidle ..	Neb. S. C. 101
Wheeler vs. Traders Ins. Co.	N. H. S. C. 184
Whipple vs. Supreme Lodge Knights of Honor ..	Kan. S. C. 223
Wise vs. Phoenix Ins. Co.	N. Y. C. A. 707
Zielke vs. London Ass'e Corp'n.	Wis. S. C. 62

LOWER COURT DECISIONS.

	PAGE
Agricultural Ins. Co. vs. Race et al.....	Ill. Sup'r C..... 633
Baker vs. German Fire Ins. Co.....	Ind. Sup'r C..... 877
Boundbrook Mut. Fire Ins. Ass'n vs. Nelson et al.....	N. J. Chan. C..... 869
Calvert vs. Ohio Farmers' Ins. Co.....	Ind. Sup'r C..... 569
Cline vs. National Benefit Ass'n.....	Ind. Sup'r C..... 859
Conn. Mut. Life Ins. Co. vs. Westervelt et al.....	Conn. Sup'r C..... 74
Cunningham et al. vs. Switzerland Marine Ins. Co. et al.....	U. S. D. C., N. Y..... 318
Ferri's Assignee, vs. Kenton Ins. Co.....	Ohio Sup'r C..... 879
Karibo vs. Ins. Co. of North America.....	Ind. Sup'r C..... 478
Kirby vs. Thames and Mersey Ins. Co.....	Wis. D. C..... 852
Niagara Fire Ins. Co. vs. Drda.....	Ill. A. C..... 874
Phoenix Fire Insurance vs. Vorhis.....	Ohio C. C..... 865
Simons vs. New York Life Ins. Co.....	N. Y. Sup'r C..... 150
Tague vs. Insurance Companies.....	La. C. A..... 713
Traders Ins. Co. vs. Race et al.....	Ill. Sup'r C..... 633
Von Wien vs. Scottish Union & Nat. Ins. Co.....	N. Y. Sup'r C..... 158

CASES AND AUTHORITIES CITED

	PAGE		PAGE
Abbott vs. Camp.....	93	Ayard vs. Valencia.....	693, 829
Aston vs. Pierce.....	595	Ayres vs. Hartford Fire Ins. Co.....	569
Adams' Appeal.....	717	Ayres vs. Insurance Co.....	93, 190
Adams vs. Brownson.....	247	Baddeley vs. Baddeley.....	595
Adams vs. Mfrs. & Builders' Ins. Co.....	296	Badger vs. Phoenix Ins. Co.....	64
Adams vs. McFarlane.....	476	Baer vs. Phoenix Ins. Co.....	68
Adams vs. Nichols.....	666	Balley vs. New England Ins. Co.....	753
Addition of Contracts.....	375	Baily vs. Insurance Co.....	310
Ætna Life Ins. Co. vs. France.....	103, 267	Bainey vs. Killmore.....	681, 686
Ætna Ins. Co. vs. Tyler.....	93, 671	Baker vs. Railroad.....	820
Alabama Gold Life Ins. Co. vs. Thomas.....	807	Baker vs. Union Ins. Co.....	605
Alexander vs. Germania Ins. Co.....	159	Bail & Gage Wagon Co. vs. Ins. Co.....	93
Alexander vs. Jamieson.....	10	Ballou vs. Billings.....	362
Allen vs. Binnet.....	326	Ballou vs. Gile.....	770
Allen vs. Hill.....	356	Bank of Kentucky vs. Adams Ex. Co.....	581
Allen vs. Vermont Mut. Fire Ins. Co.....	672	Bank vs. Burnet Mfg. Co.....	693
American Ins. Co. vs. Gilbert.....	569	Bank vs. Insurance Co.....	570, 664
American Ins. Co. vs. Nelberger.....	413	Baptist Church vs. Brooklyn Ins. Co.....	740
American Ins. Co. vs. Padfield.....	279	Bassett vs. Hughes.....	454
Anderson vs. Antien.....	41	Barber vs. Britton.....	93
Anderson vs. Long.....	117	Bard vs. Poole.....	201
Anderson vs. St. Louis Mut. Life Ins. Co.....	810	Barnard vs. Kellogg.....	275
Anderson vs. Thornton.....	269	Barnard vs. Wheeler.....	476
Angel vs. Hartford Fire Ins. Co.....	160	Barnes vs. Insurance Co.....	93
Angell on Insurance.....	519, 617	Barnes vs. Company.....	188
Authracite Ins. Co. vs. Sears.....	746	Barnum vs. Company.....	185
Appleton vs. Company.....	188	Barr vs. Hill.....	594
Appleton Iron Co. vs. British Amer. Ass'n Co.....	96	Berry vs. Buene.....	125, 613
Archer vs. Company.....	190	Berry vs. Equitable Life.....	79, 125
Archibald vs. Mutual Ins. Co. of Chicago.....	431	Bartholomew vs. Merchants' Ins. Co.....	699
Argenti vs. City of San Francisco.....	733	Bauer vs. Samson Lodge K. of P.....	286, 760, 770
Arkell vs. Insurance Co.....	849	Bays vs. Herring.....	496
Arthur vs. Old Fellows Ass'n.....	385	Beal vs. P. F. Ins. Co.....	570
Asbury etc. Co. vs. Ritchie.....	770	Beale vs. Insurance Co.....	661, 664
Ashworth vs. Builders' M. F. Ins. Co.....	279	Beatty vs. Insurance Co.....	222
Atkins vs. Elwell.....	325	Becker vs. Elkins.....	528
Attorney-General vs. North America Life Ins. Co.....	809	Becke vs. Johnson.....	666
Austin vs. Searing.....	87	Bell vs. Beveridge.....	650
		Bell vs. Woodward.....	185
		Bellows vs. Stone.....	693, 829

PAGE	PAGE
Benjamin on Sales.....	661
Benjamin vs. Insurance Co.....	506
Benners vs. Buckingham.....	745, 746
Bennett vs. Company.....	189
Bergsen vs. Builders' Ins. Co.....	739
Bigelow vs. Berkshire Life Ins. Co.....	348
Bigler vs. Ins. Co.....	688
Biglow on Estoppel.....	863
Billings vs. Company.....	190
Bishop's Criminal Procedure.....	388, 702
Bishop vs. Pentland.....	328, 330
Bissell vs. Mich. etc. R. R. Co.....	729, 730, 733
Black etc. Society vs. Vandike.....	86
Blackett vs. Royal Exchange Ass'e Co.....	275
Blackstone vs. Allemania Fire Ins. Co.....	452
Blair vs. Ellsworth.....	523
Blake vs. Insurance Co.....	93
Bledsoe vs. Nixon.....	197
Bliss Life Ins. Co.....	337, 347, 595, 596, 746, 769, 824
Blood vs. Howard Fire Ins. Co.....	60
Bloom vs. Franklin Life Ins. Co.....	346
Blooming Grove Mut. Co. vs. McAlarney.....	391
Bodine vs. Insurance Co.....	570
Boetcher vs. Hawkeye Ins. Co.....	494, 699
Bolton vs. Bolton.....	365
Bond vs. Bunting.....	594, 696
Bond vs. Clark.....	93
Bonnell vs. Griswold.....	178
Bonner vs. Home Ins. Co.....	446
Bottomley vs. United States.....	432
Bound vs. Lathrop.....	247
Bowker's Estate.....	594
Bowman vs. Agricultural Ins. Co.....	160
Boyce vs. Watson.....	247
Byd vs. Dubois.....	775
Bradford vs. Barclay.....	447
Bradford vs. Bush.....	629
Bradley vs. Ballard.....	729, 733
Bradley vs. Steam Packet Co.....	186
Brady vs. Insurance Co.....	514
Brady vs. Northwestern Ins. Co.....	662, 664
Brecknock vs. Pritchard.....	666
Brickell vs. Hulse.....	325
Briggs vs. Shaw.....	693, 829
Brinley vs. National Ins. Co.....	661
British America Ins. Co. vs. Joseph.....	776
Brook vs. Hidy.....	343
Brooks vs. Phenix Life Ins. Co.....	824
Brown vs. Bartlett.....	186
Brown vs. Buffalo & S. L. R. R.....	328, 329
Brown vs. Foster.....	663
Brown vs. Insurance Co.....	310, 514
Brown vs. Royal Ins. Co.....	663, 664
Bruce vs. Continental Life Ins. Co.....	813
Brummer vs. Cohn.....	125, 434
Bruner vs. Sheik.....	666
Brunt vs. Eoff.....	375
Bryant vs. Company.....	190
Bryant vs. Moore.....	629
Bryce vs. Lorillard Ins. Co.....	868
Buchanan vs. Company.....	190
Buffalo Catholic Institute vs. Bitter.....	178
Bullock vs. Dommett.....	666
Bunn's Appeal.....	747, 748
Burbank vs. Rockingham Mut. Fire Ins. Co.....	671
Burkhard vs. Ins. Co.....	664
Burkhard vs. Travelers Ins. Co.....	347, 349
Burnes vs. Thompson.....	351
Burr Civ. Ev.....	387
Burritt vs. Saratoga Mut. Fire Ins. Co.....	570
Burroughs vs. State Assurance Co.....	753, 754
Burton vs. Gore Dist. Mut. Fire Ins. Co.....	671
Busk vs. Royal Exch. Ass'e Co.....	327
Butler vs. Watkins.....	432
Butler vs. Wildman.....	331
Cables vs. Prescott.....	754
Cabot vs. Christie.....	570, 571
Camp's Appeal.....	596
Campbell vs. Company.....	188
Campbell vs. Mon. F. Ins. Co.....	476
Campbell vs. New England Mut. Life Ins. Co.....	102, 570, 753
Campbell's Estate.....	594
Canuel vs. Buckle.....	595
Cargill vs. Ins. Co.....	849
Carlin vs. Company.....	190
Carpenter vs. American Fire Ins. Co.....	570
Carpenter vs. Insurance Co.....	506
Carpenter vs. Providence Washing-ton Ins. Co.....	671, 688
Carper vs. Kitt.....	345
Carrier vs. Company.....	188
Carrier vs. Dilworth.....	362
Carrigan vs. Company.....	190
Carrington vs. Connecticut F. & M. Ins. Co.....	452
Carrugi vs. Insurance Co.....	505, 507
Carson vs. Dillinger.....	197
Carson vs. Jersey City Ins. Co.....	347
Carstairs vs. Mechanics and Traders' Ins. Co.....	50, 584
Cary vs. Hoteling.....	432
Case vs. Dwire.....	535
Castle vs. Bullard.....	432
Castle vs. State.....	369
Catholic Ben. Ass'n vs. Priest.....	770
Catts vs. Phalen.....	249
Chaffee vs. Insurance Co.....	569
Chandler vs. Ins. Co.....	849
Chapen vs. Fellows.....	769
Chapin vs. Coleman.....	249

PAGE	PAGE
Chapman vs. McIlwrath.....	596
Chase vs. Washington Ins. Co.....	49
Cheney vs. Wright.....	527
Chesapeake Ins. Co. vs. Stark.....	650
Chicago Building Society vs. Crowell.....	733
Chicago etc. R. Co. vs. Ross.....	461
Chisholm vs. Northern Transp. Co.....	461
Chitty on Contracts.....	39, 66
Chitty on Pleading.....	361, 362
Christian vs. Coombe.....	324
Cincinnati Ins. Co. vs. Bakewell.....	655
Citizens Ins. Co. vs. Doll.....	448
Citizens Ins. Co. vs. Marsh.....	327
Citizens Ins. Co. vs. Short.....	388
City Fire Ins. Co. vs. Mark.....	486
Clark vs. Allen.....	103
Clark vs. Manhattan Ins. Co.....	266
Clark vs. Metropolitan Bank.....	476
Clark vs. Wilson.....	580
Clay F. & M. Ins. Co. vs. Huron Salt etc. Co.....	556
Clem vs. State.....	399
Coates vs. White.....	746
Coles vs. Iowa State M. Ins. Co.....	85
Collins vs. Company.....	190
Comegys vs. Vasse.....	580, 651
Commonwealth vs. Comly.....	666
Commonwealth vs. Hudson.....	388
Commonwealth vs. Shoe & Leather Ins. Co.....	582
Commonwealth vs. Wetherbee.....	384, 786
Commonwealth Ins. Co. vs. Cropper.....	332
Commonwealth Ins. Co. vs. Monnin- ger.....	769
Commonwealth Ins. Co. vs. Sennett	311, 443
Commonwealth Life Ins. Co. vs. Schaffer.....	26
Commonwealth Mut. Co. vs. Hunt- zinger.....	391
Company vs. Crane.....	189
Company vs. Goodall.....	188
Company vs. Kroegher.....	189
Company vs. Lewis.....	190
Company vs. McCrea.....	188
Company vs. McLaughlin.....	190
Cone vs. Niagara Ins. Co.....	375
Conn. Mut. Life Ins. Co. vs. Schaeffer	103
Conover vs. Insurance Co.....	201
Continental Ins. Co. vs. Delpauch.....	783
Continental Ins. Co. vs. Hulman.....	689
Continental Life Ins. Co. vs. Kessler.....	345
Continental Life Ins. Co. vs. Volgar.....	102
Converse vs. Norwich & N. Y. Trans. Co.....	733
Cook vs. Continental Ins. Co.....	876
Cooper vs. Coates.....	326
Cooper vs. Farmers' Mut. Fire Ins. Co.....	569
Co-operative Life Ass'n of Miss. vs. Leflore.....	267
Copeland vs. New England Ins. Co.	581, 583
Copelin vs. Ins. Co.....	655
Cornell vs. Insurance Co.....	93
Corps vs. Robiuson.....	247
Corwin vs. Hood.....	186
Cosgrove vs. Ogden.....	629
Coursin vs. Penn. Ins. Co.....	706
Cousins vs. Nantes.....	717
Cowles vs. Continental Life Ins. Co.	259, 813
Cox vs. United States.....	111
Cragin vs. Cragin.....	752
Craver vs. Christian.....	308
Crawford's Appeal.....	596
Creath vs. Sims.....	693, 829
Crescent Ins. Co. vs. Griffin & Shook	505, 741
Crittenden vs. Phoenix Mut. Ins. Co.....	596
Cross vs. Haskins.....	629
Crosse vs. Beddingfield.....	247
Crowley vs. Cohen.....	582
Cruzan vs. Smith.....	629
Cunningham vs. Caldwell.....	123
Dahlberg vs. St. Louis etc. Co.....	687
Dalby vs. Life Ins. Co.....	26
Danuron vs. Penn Mut. Life Ins. Co.	769, 862
Daniels vs. Ballantine.....	339
Darrell vs. Tibbitts.....	451
Darst vs. Gale.....	733
Davenport vs. Peoria M. & F. Ins. Co.....	629
David vs. Hartford etc. Co.....	688
Davidson vs. Barnard.....	581
Davidson vs. Phoenix Ins. Co.....	68
Davis vs. Insurance Co.....	570
Dawson vs. Fitzgerald.....	621
Day vs. Cummings.....	693, 829
Day vs. Zimmerman.....	746
Dearborn vs. Newhall.....	190
De Gorgoza vs. Knickerbocker Life Ins. Co.....	348
Deginther's Appeal.....	745, 747
De Grove vs. Metropolitan Ins. Co.....	43
Delancey vs. Company.....	189
Delavigne vs. United Ins. Co.....	268
Delaware & Hudson Canal Co. vs. Penn. Coal Co.....	621
Delaware Ins. Co. vs. Quaker City Ins. Co.....	451, 452
Delonguermase vs. Insurance Co.....	113
Demerline et al. vs. Gabel et al.....	100
Denning vs. Williams.....	596
Denny vs. New York Central R. R. Co.....	329
Derham vs. Berry.....	746
Dermott vs. Jones.....	665, 666

PAGE	PAGE
De Rouge vs. Elliott.....431	Field vs. Mayor.....201
Devereux vs. Devereux.....192	Fire Association vs. Williamson.....173
Diehl vs. Adams Co. Mut. Ins. Co. 173	Firemen's Ins. Co. vs. Powell.....327
Dietrich vs. Madison Relief Ass'n...836	Fischer vs. Hope Mut. Life Ins. Co. 454
Distilled Spirits.....193	Fithian vs. Northwestern Life Ins. Co.812
Dixon vs. Clark.....741	Flanders on Insurance.....60, 530, 537
Doherty vs. Farris.....325	Fletcher vs. Insurance Co.....111
Dolan vs. Court of Good Samaritan. 86	Fletcher vs. Warren.....693, 829
Donahue vs. Insurance Co.....92	Folmer's Appeal.....610
Donahue vs. Windsor Co. Ins. Co. 94	Foot vs. Aetna Life Ins. Co.....287
Donaldson vs. Benton.....818	Foram vs. Howard Ben. Ass'n.....86
Donnell vs. Railroad Co.....755	Forrest vs. Fulton Ins. Co.....582
Douglass vs. Knickerbocker Life Ins. Co.346	Foster vs. Equitable Mut. Fire Ins. Co.485, 486
Dowdall vs. Pennsylvania R. R. Co. 326	Foster vs. State Bank.....694, 829
Drew vs. Kimball.....189	Fox vs. Phoenix Fire Ins. Co.....671
Drinkout vs. Eagle Machine Works. 100	Francis vs. Insurance Co.....92
Duckworth vs. Duckworth.....528	Franklin Ins. Co. vs. Humphries....89
Dudgeon vs. Pembroke.....332	Franklin Fire Ins. Co. vs. West.....746
Duncan vs. Lyons.....694, 829	Franklin Life Ins. Co. vs. Hazzard. 101
Duncan vs. Sun Fire Ins. Co.....173	Franklin Life Ins. Co. vs. Sefton.....101
Dunham vs. Downer.....693, 828, 829	Franklin Life Ins. Co. vs. Wallace. 347
Dunn vs. G. T. Railway.....476	Fretz vs. Bull.....580
Durant vs. Pratt.....824	Friesmuth vs. Agawam Mut. Fire Ins. Co.267
Durian vs. Central Verein.....770	Fross et al.'s Appeal.....594
Eadie vs. Slemmon.....78, 125, 436, 437, 438, 441	Fugure vs. Mutual Society of St. Joseph.....85
Earl vs. Champion.....594	Fulweiler vs. Hughes.....746
Eggleston vs. Council Bluffs Ins. Co.494	Funk vs. Minnesota etc. Ass'n.....688
Elgerly vs. Insurance Co.....310	Furnas vs. Frankman.....629
Elkhart Mutnal Aid etc. Ass'n vs. Houghton.....87, 768	Gackenbach vs. Brouse.....595
Elliott vs. Company.....190	Gage vs. Whittier.....652
Elliott vs. Jackson.....245	Gans vs. St. Paul F. & M. Ins. Co. 672
Elliott's Appeal.....746, 747	Gantt vs. American Cent. Ins. Co. 452
Ellis vs. Albany City Fire Ins. Co. 43	Garlinghouse vs. Whitewell.....569
Ellis vs. Council Bluffs Ins. Co.484, 485, 486	Garrett's Appeal.....660
Ellis vs. Krentzinger.....203	Garrison vs. Memphis Ins. Co.....580
Emanord vs. Bird.....123	Gashwiler vs. Willis.....396
Enterprise Ins. Co. vs. Parisot.....94	Gates vs. Penn. Fire Ins. Co.....571
Etheridge vs. Palm.....818	Gauch vs. Peiser.....92
Everett vs. Continental Ins. Co. 60	Gause vs. Hale.....595
Ex Parte Pys.....595	Gee vs. Cheshire etc. Co.....687
Excelsior Mut. Aid Ass'n etc. [vs. Reddle.....99	General Ins. Co. vs. Sherwood.....581
Express Company vs. Caldwell.....581	Gerlach vs. Coates.....596
Expressmen's Aid Society vs. Fenn. 770	Germania Ins. Co. vs. Curran.....556
Fairchild vs. Northeastern Mut. Life Association.....103	Germania Ins. Co. vs. Rudwig.....352
Farmers' Ins. Co. vs. Wells.....876	Gerrish vs. Towne.....185
Farmers' M. F. Ins. Co. vs. Marshall. 570	Gery vs. Ehrgood.....747
Farmers & Mechanics' Ins. Co. vs. Meeker.....708	Gilbert vs. Moose's Admr.....25, 841
Farrell vs. Insurance Co.....310	Gladling vs. Insurance Ass'n.....140
Fassinow vs. State.....389	Glanz vs. Gloeckler.....769
Fay vs. Decamp.....361	Glen vs. Hope Mut. Life Ins. Co. 453
Ferree vs. Oxford Ins. Co.....202	Globe Ins. Co. vs. Globe Mut. Ins. Co.544
Fessler vs. Ellis.....746	Globe Ins. Co. vs. Sherlook.....580
	Globe Ins. Co. vs. Wolf.....409
	Godfrey vs. Wilson.....769
	Godin vs. London Ass'e Co.....617

	PAGE		PAGE
Goit vs. Insurance Co.....	209	Healy vs. Ins. Co.....	505
Goodrich vs. Tracy.....	569	Hearne vs. Edmunds.....	328
Goodsell vs. Bolders.....	26	Heartley vs. Nicholson.....	595
Goodwin vs. State.....	388	Heaton vs. Insurance Co.....	208
Gordon vs. Ware Savings Bank.....	134	Heebner vs. Eagle Ins. Co.....	294, 650
Goss vs. St. Paul F. & M. Ins. Co.....	92	Heilman vs. Ins. Co.....	661, 664
Gough vs. St. John.....	496	Helfenstein's Estate.....	596
Gould on Pleading.....	85	Hendel vs. Berks & Dauphin Turn- pike Road.....	310
Gould vs. Emerson.....	753, 754	Henderson vs. Huckley.....	693, 829
Grace vs. American Central Ins. Co. 159, 275, 296		Henderson vs. Wild.....	247
Grady vs. Insurance Co.....	512	Hendrickson vs. Hinckley.....	528
Graham vs. Railway Co.....	245	Henry vs. Hinman.....	308
Grannis vs. Hooker.....	245	Hepburn vs. Insurance Co.....	111
Gratton vs. Metropolitan Life Ins. Co.....	144	Herckenrath vs. Am. Mut. Ins. Co.....	452
Graves vs. White.....	43	Herman vs. Insurance Co.....	636
Gray vs. McDonald.....	454	Herrman vs. Adriatic Fire Ins. Co.....	279
Gray's Estate.....	596	Herrman vs. Insurance Co.....	203
Greely vs. American Cent. Ins. Co.....	570	Hetzell vs. Bentz.....	527
Green Bay Co. vs. Hewett.....	535	Hickman vs. Shimp.....	115
Green's Brice's Ultra Vires.....	734	Hicks vs. Perry.....	772
Greene vs. Pacific Mut. Ins. Co.....	294	Hicks vs. Skinner.....	192
Greenleaf on Evidence. 185, 186, 496, 741		Higbe et ux. vs. Moore.....	100
Greenwich Ins. Co. vs. Baab.....	332	Hill vs. Ins. Co.....	849
Grey's Ex'r vs. Mobile Trade Co.....	329	Hill Mfg. Co. vs. Providence etc. S. S. Co.....	461
Griffith vs. Wright.....	731	Hincken vs. Insurance Co.....	447
Grover vs. Grover.....	596	Hine & Nichols' Digest.....	665
Guardian Mut. Life Ins. Co. vs. Ho- gan.....	102	Hing vs. Aetna Ins. Co.....	571
Hackney vs. Vrooman.....	596	Hingston vs. Aetna Ins. Co.....	699
Hadley vs. Company.....	188	Hitchcock vs. Galveston.....	734
Haley vs. Company.....	190	Hitchcock vs. Northwestern Ins. Co.....	202
Hall vs. Railroad Co.....	190, 580	Hodge vs. Security Ins. Co.....	159
Halpenny vs. People's Ins. Co.....	837	Hoffman vs. Aetna Ins. Co.....	200
Harley vs. Heist.....	769, 862	Holle vs. Bailey.....	454
Harper vs. Albany M. Ins. Co.....	298	Holbrook vs. St. Paul F. & M. Ins. Co.....	60
Harper vs. Company.....	187, 190	Holladay vs. Holladay.....	69
Harriman vs. Queen Ins. Co.....	64	Holmes vs. Goodwin.....	196
Harrington vs. Workingmen's Ben. Ass'n.....	86	Home Ins. Co. vs. Baltimore Ware- house Co.....	94, 582
Harris vs. Columbiana Co. Mut. Ins. Co.....	268	Home Mut. Ins. Co. vs. Garfield.....	685
Harris vs. Fawcett.....	39, 40	Hone vs. Mutual Safety Ins. Co.....	452
Hart vs. Pennsylvania Rd.....	581	Hood vs. N. Y. & N. H. R. R. Co.....	733
Hart vs. Western R. Corp.....	49	Horn vs. Cole.....	189
Hartford Fire Ins. Co. vs. Reynolds.....	790	Hotchkiss vs. Germania Ins. Co.....	121
Hartford Ins. Co. vs. Webster.....	876	Hough vs. Railway Co.....	461
Harvey vs. Huston.....	351	Houghtaling vs. Kilonhouse.....	496
Haskins vs. Fire Ins. Co.....	501, 502	Houghton vs. Pattee.....	166
Haskins vs. Hamilton Mut. Ins. Co.....	663	Howard vs. McDonough.....	707
Hastie vs. De Peyster.....	452	Howell's Exr. vs. Baltimore Equita- ble Society.....	173
Hatch vs. Taylor.....	629	Hubbard vs. Hartford Fire Ins. Co.....	687
Hayes vs. Livingston.....	652	Huling vs. Craig.....	666
Hayes vs. Mich. Cent. R. Co.....	329	Hull vs. Cumberland Valley M. P. Co.....	301
Haywood vs. Davis.....	192	Hull, Admr., vs. Northwestern Life Ins. Co.....	812
Heacock vs. Saratoga Mut. Fire Ins. Co.....	484	Hulson vs. Merrifield.....	769
Head vs. Providence Ins. Co.....	770	Humphrey vs. Humphrey.....	496

PAGE	PAGE
Hunt's Appeal.....595	Ionides vs. Universal M. Ins. Co....331
Hunter vs. Jameson.....629	Isham vs. Greenham.....343
Hurry vs. Hurry.....595	Jackson Co. vs. Boylston Ins. Co....584
Hutchinson vs. Gormley.....747	Jackson vs. Silvernail.....202
Hyde vs. Lynde.....847	Janney vs. Brown.....122
Illinois Masons' Ben. Soc. vs. Bald- win.....385	Jeffres vs. Life Ins. Co.....287
Illinois Masons' Ben. Soc. vs. Win- throp.....385	Jendervine et al. vs. Rose et al. 39, 40, 41
In re Campbell's Estate.....27	Jennings vs. Chenangs Co. Mut. Ins. Co.....569
In re Commissioners Washington Park.....324	Jetter vs. New York & H. R. R.....328
Ins. Co. of North America vs. Mc- Dowell.....570	John Hancock Mut. Life Ins. Co. vs. Daly.....350, 697
Insurance Co. vs. Bailey.....316	Johnson vs. Hart.....201
Insurance Co. vs. Bernard.....267	Johnson vs. Jones.....629
Insurance Co. vs. Bruner.....190	Johnson vs. N. B. & M. Ins. Co....671
Insurance Co. vs. Chicago Ice Co....93	Johuson vs. Phoenix Ins. Co.....92
Insurance Co. vs. Cropper.....664	Jones vs. Insurance Co.....447
Insurance Co. vs. Douglass.....782	Jordan et et. vs. Dobbins.....37, 39, 41
Insurance Co. vs. Drach.....664	Jordan vs. State Ins. Co.....494
Insurance Co. vs. Fahren.....570	Joyce vs. Kennard.....582
Insurance Co. vs. Flynn & Hamm.....222	Judah vs. Randall.....512
Insurance Co. vs. Fogarty.....512	Kaltenbach vs. McKenzie.....654
Insurance Co. vs. Froh.....782	Katz vs. Moore.....528
Insurance Co. vs. Gould.....447	Keating vs. State.....100
Insurance Co. vs. Grayhill.....93	Keith vs. Quincy M. Ins. Co....279
Insurance Co. vs. Gridley.....350	Keller vs. Gaylor.....746
Insurance Co. vs. Holt.....687	Kelley vs. Worcester Mut. Fire Ins. Co.....172
Insurance Co. vs. Hurd.....508	Kennedy vs. Ware.....594
Insurance Co. vs. Jones.....190	Kent vs. Nav. Co.....746
Insurance Co. vs. Kelly.....203	Kentucky Mut. Life Ins. Co. vs. Miller.....770
Insurance Co. vs. Kinniers.....190	Kernochen vs. Insurance Co....93
Insurance Co. vs. Kroegher.....190	Keyes vs. Railway Co.....245
Insurance Co. vs. Lawrence.....92, 310	Keys vs. Carpenter.....570
Insurance Co. vs. Lyman.....374	Kent's Commentaries.....592, 617, 769
Insurance Co. vs. McCain.....476	Kidder vs. Kidder.....594
Insurance Co. vs. McLanathan.....665	Kieffer vs. Ehler.....746
Insurance Co. vs. McPherson.....92	Killips vs. Insurance Co.....64
Insurance Co. vs. Mahone.....326, 410	Kimball vs. Insurance Co.....505
Insurance Co. vs. Matthews.....250	Kimball vs. Lancaster.....186
Insurance Co. vs. Morse.....87	King vs. Insurance Co.....570
Insurance Co. vs. Mowry.....824	Kirkstall Brewery Co. vs. Turners Ry. Co.....326
Insurance Co. vs. Newton.....324, 590	Klein vs. Insurance Co.....457
Insurance Co. vs. Norton.....409, 672	Knickerbocker Life Ins. Co. vs. Dietz. 807
Insurance Co. vs. Padfield.....636	Knickerbocker Life Ins. Co. vs. Har- lan.....807, 810
Insurance Co. vs. Robinson.....808	Knickerbocker Ins. Co. vs. Weitz. 752
Insurance Co. vs. Ruben.....310, 447	Koethe vs. O'Brien.....308
Insurance Co. vs. Schell.....190	Kollock vs. Parcher.....454
Insurance Co. vs. Schreffler.....310	Krugh vs. Insurance Co.....837
Insurance Co. vs. Sennett.....310	Lackey vs. Georgia Ins. Co.....688
Insurance Co. vs. Terry.....137	Lane vs. Cameron.....243
Insurance Co. vs. Transportation Co. 330	Lafayette, Bloomington & Miss. R. R. Co. vs. Winalow.....311
Insurance Co. vs. Tucker.....636, 640	Lafond vs. Deems.....86
Insurance Co. vs. Slaughter.....207	Lamott vs. Ins. Co.....824
Insurance Co. vs. Wilkinson.....410, 411, 477, 570	Langhoff vs. Milwaukee.....329
Insurance Co. vs. Williams. 259, 268, 570	Landers vs. Watertown Ins. Co....688
Insurance Co. vs. Updegraff.....301	
Insurance Co. vs. Zaenger.....447	

PAGE	PAGE		
Lant's Appeal.....	595	Marshall vs. Col. M. Ins. Co.....	571
Larkin vs. McMullin.....	595	Marshall vs. Company.....	188
La Rose vs. Logansport etc. Bank.....	349	Martin vs. Aetna Ins. Co.....	752, 810
Lazarus vs. Commonwealth Ins. Co.....	202	Martin vs. Tradesmen's Ins. Co.....	410
Leadbetter vs. Aetna Ins. Co.....	94	Maryland etc. Society vs. Clendenen.....	79
Leake on Contracts.....	556, 664	Mason vs. Grand Lodge etc.....	89
Le Blanch vs. Wilson.....	544	Masonic Mut. Life Ins. Co. vs. Mo- Anley.....	770
Lee on Insurance.....	650	Massachusetts Nat. Bank vs. Bullock.....	755
Lemon vs. Phenix Life Ins. Co.....	103, 613	Massoth vs. Delaware & H. C.....	328
Lender's Exr. vs. Hartford L. & A. Co.....	99	Masters vs. Madison Ins. Co.....	571
Lentz vs. Martin.....	315	Matson vs. Farm Buildings Ins. Co.....	173
Leonard vs. American Ins. Co.....	770	Matthews vs. Joyce.....	197
Levi vs. New Orleans Ins. Ass'n.....	330	May on Insurance.....	92, 93, 147, 188, 190, 258, 259, 269, 363, 385, 512, 560, 569, 570, 617, 618, 664, 737, 769, 776, 786.
Levy vs. Baillie.....	879	May vs. Co.....	190
Lewis vs. Insurance Co.....	93	McBride vs. Insurance Co.....	64
Lewis vs. Phoenix Mut. Life Ins. Co.....	412	McCabe vs. D. Co. Mut. Ins. Co.....	570
Life Ins. Co. vs. Le Pert.....	741	McCluer vs. Girard F. & M. Ins. Co.....	59, 868
Lillon vs. Britton.....	742	McClure vs. Johnson.....	770
Lincoln vs. Clafin.....	432	McClure vs. Watertown Ins. Co.....	876
Linsenbiger vs. Gourley.....	594	McCord vs. Noyes.....	746
Little Schuylkill Nav. Co. vs. Rich- ards.....	310	McCormick vs. Springfield Fire Ins. Co.....	140
Liverpool etc. Co. vs. Verdier.....	689	McDermott's Appeal.....	594
Lochner vs. Home Mutual Ins. Co.....	409	McDermott vs. State.....	100
Locklin vs. Moore.....	556	McDowell vs. Laev.....	454
London & Lancashire Fire Ins. Co. vs. Graves.....	60	McGlade's Appeal.....	594
Loudon & N. W. Ry. vs. Glyn.....	582	McGuire vs. Adams.....	594
Long's Appeal.....	594	McKee vs. Phoenix Ins. Co.....	363
Longueville vs. Western Assurance Co.....	60	McKesson vs. Sherman.....	64
Loomis vs. Eagle L. & H. Ins. Co.....	103	McLaughlin vs. Insurance Co.....	113
Loos vs. Hancock M. L. I. Co.....	595	McMaster vs. Insurance Co.....	93, 571
Lord vs. Dall.....	824	Mead vs. Hein.....	446
Lord vs. Goodall.....	461	Mead vs. Northwestern Ins. Co.....	173
Lonsburg vs. Co.....	190	Mehaffy vs. Share.....	362
Lowell vs. Middlesex Mut. Fire Ins. Co.....	569	Mellen vs. Whipple.....	751
Loy vs. Ins. Co.....	849	Mentz vs. Armenia F. Ins. Co.....	87
Lund vs. Tyngsboro.....	331	Mercantile Ins. Co. vs. Caleb.....	50, 51, 584
Lycoming Fire Ins. Co. vs. Schreffler.....	311	Merrill vs. Agricultural Ins. Co.....	463, 461, 560
Lycoming Fire Ins. Co. vs. Ward.....	570	Meyer vs. Herneke.....	374
Lyon vs. Travelers Ins. Co.....	94, 672	Michael vs. Mutual Ins. Co.....	571
Lyons vs. Providence Washington Ins. Co.....	60	Miller vs. Goodwin.....	595
Lyree vs. Fletcher.....	268	Miller vs. Shriner.....	351
Mackenzie vs. Whitworth.....	582	Miller vs. Mut. Ben. Ins. Co.....	494
Macqueen's Husband and Wife.....	595	Mills vs. Farmers' Ins. Co.....	59
Macy vs. Whaling Ins. Co.....	294	Milroy vs. Lord.....	595
Magniac vs. Thompson.....	595	Milwaukee Ry. Co. vs. Kellogg.....	330
Malleable Iron Works vs. Insurance Co.....	493	Minturn vs. Warren Ins. Co.....	293
Malone's Estate.....	595, 596	Mitchell vs. Cook.....	742
Manhattan Life Ins. Co. vs. Smith.....	769	Mitchell vs. Home Ins. Co.....	537
Manigle's Estate.....	746	Mitchell vs. Lycoming M. Ins. Co.....	85
Manville vs. Belden M. Co.....	734	Mitchell vs. Stinson.....	347
Marine Ins. Co. vs. Hodgson.....	528	Mobile & M. Ry. vs. Jurey.....	581
Marine Ins. Co. vs. Stras.....	325		
Marmaud vs. Melledge.....	655		

PAGE	PAGE
Moins vs. Insurance Co.	113
Moliere vs. Company.	190
Moore vs. Insurance Co.	190, 447, 448
Moore vs. Noble.	183
Moorhead vs. Fry.	361
Morgan vs. Malleson.	595, 596
Morrell vs. Irving Fire Ins. Co.	661
Morrell vs. Ins. Co.	664
Morrison vs. Davis.	329
Morse vs. Connecticut R. Co.	326
Mosley vs. Insurance Co.	92, 571
Mosley vs. Vi. Mut. F Ins. Co.	93, 94
Mouler vs. American Life Ins. Co.	346
Muhleman vs. Nat. Ins. Co.	758
Mullen vs. Maguire.	745, 747
Muller vs. Phillips.	361
Murphy's Estate.	594
Mutual Aid Society vs. White.	391
Mut. Ben. Ass'n vs. Miller.	769
Myers vs. Drake.	666
Nash vs. Gilheson.	117
National Bank vs. Insurance Co.	346
National Bank vs. Burnet Mfg. Co.	829
National Bank vs. Matthews.	734
National Benefit Ass'n vs. Jackson.	863
National Ins. Co. vs. Webster.	327, 332
Nave vs. Insurance Co.	512
Neskern vs. Northwestern Endow- ment Ass'n.	795
Nettleton vs. St. Louis Life Ins. Co.	810
New vs. Insurance Co.	570
Newby vs. Reed.	618
New England Iron Co. vs. Gilbert El. R. R. Co.	43
Newmark vs. Insurance Co.	448
Newton vs. Life Ins. Co.	448
New York Bowery Fire Ins. Co. vs. New York Fire Ins. Co.	451, 452
New York Cent. Ins. Co. vs. Nat. Pro- tection Ins. Co.	171
New York Cent. Ins. Co. vs. Watson.	672
New York Ins. Co. vs. Clopten.	740
New York Life Ins. Co. vs. Flack.	431
Nichols vs. Downing.	247
Nichols vs. Fayette Mut. Fire Ins. Co.	671
Nichols vs. Johnson.	375
Nims vs. Bigelow.	190
Nixon vs. Downey.	496
Noble vs. Kennoway.	187
Norden vs. Jones.	245
Norris vs. Massachusetts Ins. Co.	754
North British & M. Ins. Co. vs. L. & L. & G. Ins. Co.	582, 583
Northwestern Life Ins. Co. vs. Elliott.	248
Northwestern Mut. Ins. Co. vs. Haze- lett.	689, 697
Northwestern Mut. Life Ins. Co. vs. Bonner.	812
Northwestern Mut. Life Ins. Co. vs. Herman.	100
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	
Northwestern Mut. Life Ins. Co. vs.	

PAGE	PAGE
Phoenix Ins. Co. vs. Abbott.....	755
Phoenix Ins. Co. vs. Doster.....	340
Phoenix Ins. Co. vs. Erie & W. Trans. Co.....	50
Phoenix Ins. Co. vs. Lawrence.....	311
Phoenix Ins. Co. vs. Taylor.....	298
Piedmont etc. Ins. Co. vs. Ewing.....	350
Pierce vs. Charter Oak Life Ins. Co.....	400
Pierce vs. Company.....	188
Pierce vs. Travelers Ins. Co.....	348, 349
Pindar vs. Company.....	190
Pitney vs. Glens Falls Ins. Co.....	121
Pollock's Principles of Contracts.....	664
Porter vs. Seiler.....	117
Pottsville Mut. F. Ins. Co. vs. Min- nequa Springs Imp. Co.....	221, 468
Poultney vs. Bachman.....	86
Powe vs. Powe.....	741
Powers vs. State.....	100
Pratt vs. Andrews.....	496
Pratt vs. Maynard.....	652
Pratt vs. Trustees.....	39
Putney vs. Farnham.....	454
Preble vs. Boghurst.....	595
Preston vs. Hill.....	544
Fringle vs. Fringle.....	594
Protection Life Ins. Co. vs. Foote.....	147
Provident L. Ins. & Invest. Co. vs. Baum.....	101, 102
Provincial Ins. Co. vs. Leduc.....	655
Queen Ins. Co. vs. Jefferson Ice Co.....	511
Radway vs. Waddell.....	351
Railroad Co. vs. Butman.....	326
Railroad Co. vs. Lockwood.....	581
Railroad Co. vs. Pratt.....	581
Railroad Co. vs. Reeves.....	329
Railway Co. vs. Stevens.....	581
Raine vs. Home Ins. Co.....	200
Rapp vs. Latham.....	247
Bathbone vs. Company.....	190
Rawstorne vs. Gandell.....	247
Rayner vs. Godmond.....	328
Reaper City Ins. Co. vs. Sorey.....	121
Reed vs. Fire Ins. Co. of Phila.....	619
Reed vs. Lukens.....	301
Reed vs. Penrose.....	746
Reed vs. Washington F. & M. Ins. Co.....	621
Rennick vs. Chandler.....	347
Reynolds vs. Continental Ins. Co.....	790
Reynolds vs. Ocean Ins. Co.....	654, 655
Richards vs. Delebridge.....	595
Richardson vs. Maine Ins. Co.....	414, 569
Richardson vs. Richardson.....	595, 596
Richmond vs. Johnson.....	770
Kiddlesburg Coal Co. vs. Rodgers.....	310
Rider vs. Commonwealth Ins. Co.....	661
Riley vs. Riley.....	595
Rintoul vs. N. Y. C. & H. R. R.....	50, 584
Rising Sun Ins. Co. vs. Slaughter.....	688
Roberts vs. Crawford.....	652
Roberts vs. Reed.....	594
Robbins vs. City of Chicago.....	544
Rodgers vs. Remus.....	663
Rogers vs. Chestnut.....	820
Rohrbach vs. Germania Fire Ins. Co.....	159
Rolfe vs. Rundle.....	500
Roscoe on Criminal Evidence.....	289
Ross vs. Mather.....	183
Roth vs. City Ins. Co.....	570
Roumage vs. Fire Ins. Co.....	92
Ruan vs. Perry.....	495
Buck vs. Insurance Co.....	512
Busk vs. Royal Exch. Ass'n Co.....	330
Russum vs. St. Louis Mut. Life Ins. Co.....	811
Ryan vs. World Mut. Life Ins. Co.....	411
St. John vs. American Mut. Ins. Co.....	331
Salisbury vs. Hekla Fire Ins. Co.....	556
Sansum's Digest.....	571
Saunders vs. Frost.....	742
Savage vs. Allen.....	693, 829
Savage vs. Corn Exch. Ins. Co.....	582
Savage vs. Insurance Co.....	202
Schmidt vs. Insurance Co.....	496
Schollenberger vs. Phenix Ins. Co.....	621
Schouler Dom Rel.....	595, 596
Schunk vs. Gegenseitiger.....	385
Scott vs. Avery.....	620
Security Ins. Co. vs. Fay.....	790
Sedwick's Stat. and Const. Law.....	734
Selfridge's Appeal.....	746
Seibert vs. Price.....	310
Senat vs. Porter.....	324
Shaw vs. Insurance Co.....	571
Shaw vs. Republic Life Ins. Co.....	177
Shear & B. Neg.....	328
Shehan vs. Malone.....	197
Sheldon & Co. vs. Hartford Fire Ins. Co.....	569
Shepherd vs. People.....	388
Sherman vs. Niagara Ins. Co.....	202
Shoneman vs. Insurance Co.....	208
Shuggart vs. Locoming Fire Ins. Co.....	139
Siedt vs. Wireman.....	666
Siepel vs. International Ins. Co.....	363
Silverberg vs. Phoenix Ins. Co.....	140
Simeral vs. Dubuque M. F. Ins. Co.....	85
Simmons vs. Mervin.....	197
Simpson vs. Satterlee.....	201
Simpson vs. Thompson.....	580
Sims vs. Insurance Co.....	93, 190, 571
Sleeper vs. New Hampshire Ins. Co.....	879
Smethurst vs. Woolston.....	361
Smilie vs. Quinn.....	436
Smith vs. Chapell.....	595
Smith vs. Colonial M. F. I. Co.....	665
Smith vs. Melver.....	693, 829
Smith vs. Mechanics & Traders Ins. Co.....	60

PAGE	PAGE
Smith vs. St. Louis Mut. Life Ins. Co. 810	Sutherland on Damages. 664
Smith vs. Saratoga Mut. Fire Ins. Co. 569	Swain vs. Saltmarsh. 186
Smith vs. Schulenberg. 245	Swan vs. Watertown F. Ins. Co. 566
Snyder vs. Riggs. 351	Swancot Machine Co. vs. Partridge. 113
Souter vs. Baymore. 329	Swarthout vs. Chicago & N. W. Ry. 835
Southerland vs. Old Dominion Ins. Co. 687	Swick vs. Home Ins. Co. 350
Spare vs. Home Mutual Ins. Co. 68	Swift vs. Colgate. 183
Spence vs. Spence. 310	Swift vs. Railway Pass. & T. C. Ben. Ass'n. 770
Spooner vs. Vt. Mut. Ins. Co. 93	Symonds vs. Northwestern Life Ins. Co. 812
Sprague vs. Train. 569	Tate vs. Hyslop. 584
Springfield Ins. Co. vs. Allen. 871	Taylor vs. Merchants Ins. Co. 540
Stache vs. Insurance Co. 571	Taylor on Evidence. 247
Stafford vs. Whitcombe. 652	Taylor's Appeal. 27
Standard Oil Co. vs. Triumph Ins. Co. 159	Taylor vs. Harwood. 328
Stark on Evidence. 190	Taylor vs. Insurance Co. 92, 93
State Board of Ag. vs. Citizens Street Ry. Co. 733	Tebbetts vs. Hamilton Mut. Ins. Co. 569
State Mut. Co. vs. Arthur. 391	Tennessee Lodge vs. Ladd. 770
State vs. Bankers etc. Ass'n. 385	Terre Haute and Indianapolis R. R. Co. vs. Buck. 697
State vs. Bridgman. 702	The De Soto. 328
State vs. Central Ohio Mut. Relief Ass'n. 610	The Fenham. 328
State vs. Cohn. 387	The Genesee Chief. 328
State vs. Day. 702	The Glenfruin. 333
State vs. Lennon. 195	The Hadji. 581
State vs. Live-stock Ass'n. 385	The Harriman. 666
State vs. Miller. 385	The Julia Blake. 319
State vs. Northfield. 702	The Leo. 328
State vs. Moran. 702	The Lion. 328
State vs. Paddock. 702	The Monticello. 580
State vs. Standard Life Ass'n. 385	The Northern Indiana. 328
State vs. Stone. 347	The Pennsylvania. 328
State vs. Woodward. 702	The Portsmouth. 332
State vs. Woram. 733	The Potomac. 580
Stevens vs. Warren. 102	The Scotia. 329
Steinbach vs. Company. 185, 187, 190	The Scotland. 460
Stilley vs. Folger. 594	The Sidney. 453, 584
Stillwell vs. Mut. Life Ins. Co. 159	The Voorwards & Khedive. 328
Stokae vs. Cowan. 746	The Warkworth. 461
Stokell vs. Kimball. 754	The Whistler. 461
Story on Agency. 476	Thompson vs. Hopper. 331
Story Equity Jurisprudence. 594, 693, 743, 828, 851	Thompson vs. Insurance Co. 89, 341, 457
Stratton vs. Kennard. 100	Thompson vs. Williams. 188
Strohn vs. Hartford Fire Ins. Co. 453	Thorne vs. Turck. 215
Strong vs. Bass. 746	Through's Estate. 27
Strong vs. Manufacturers' Ins. Co. 706	Thurston vs. Koch. 617
Strong vs. Phoenix Ins. Co. 452	Thwaites vs. Richardson. 247
Stullman vs. Stullman. 595	Thwing vs. Insurance Co. 111
Sugden on Vendors. 361	Timayenis vs. Union M. L. Ins. Co. 613, 614
Sugge vs. Liverpool etc. Co. 688	Times Ins. Co. vs. Hawke. 661
Sun Ins. Co. vs. Ocean Ins. Co. 582	Tisdale vs. Jones et al. 595
Supervisors vs. Decker. 243	Titus vs. Glens Falls Ins. Co. 671, 672
Supreme Council etc. vs. Perry. 772	Tonnele vs. Hall. 324
Supreme Lodge etc. vs. Schmidt. 768	Tonluine vs. Sager. 741
Sussex Co. Mut. Fire Ins. Co. vs. Woodruff. 871	Town of Fifield vs. Sweeney. 244
	Town of Platteville vs. Hooper. 454
	Towne vs. Fitchburg Mut. Fire Ins. Co. 589

	PAGE		PAGE
Trough's Estate	594	Western Ins. Co. vs. Cropper	332
Trustees vs. Bennett	666	Wharton on Contracts	661
Truly vs. Wanzer	693, 829	Wharton's Law of Evidence	496, 782
Tunno vs. Twezewand	595	Wheeler vs. Connecticut Mut. Life Ins. Co.	457
Turley vs. N. A. F. Ins. Co.	93	Whitcomb vs. Whiting	247
Twichell vs. Bridge	570	White vs. Landon	569
Tyler vs. Hamerly	693, 829	Whited vs. Germania Fire Ins. Co.	159
Tyson vs. Tyson	595	Whitehead vs. N. Y. Mutual Ins. Co.	440
Udderzook vs. Commonwealth	310	Whitmarsh vs. Company	190
Underhill vs. Insurance Co.	92	Whitney Arms Co. vs. Ballard	733
Union Bank of London vs. Lenanton	651	Whitney vs. McKinney	201
Union Mutual Life Ins. Co. vs. Mc-Millen	267	Wilbur vs. Bowditch Mut. F. Ins. Co.	569
Unity Association vs. Dugan	754	Wilkinson vs. Ferree	361
Universal Fire Ins. Co. vs. Block	468	Wilburn vs. Wilburn	769, 861
Van Allen vs. Farmers' Ins. Co.	121	Will's Civ. Ev.	387
Van Natta vs. Mutual Sec. Ins. Co.	49	Williams' Appeal	594
Van Schoick vs. Company	189	Williams vs. Crescent etc. Ins. Co.	671
Van Valkenburgh vs. Lenox Fire Ins. Co.	159, 200	Williams vs. Hartford Ins. Co.	512
Viele vs. Germania Ins. Co.	121, 190	Williams vs. Hodgson	247
Vos vs. Insurance Co.	92	Williams vs. Insurance Co.	570, 706
Wade vs. Gappinger et al.	100	Williams vs. Mechanics & Traders' Ins. Co.	171
Waite's Acts and Dofs.	739, 742	Williams vs. Niagara Ins. Co.	494
Walden vs. Shelburne	247	Williams vs. People's Fire Ins. Co.	171
Walker vs. Gibbs	746	Williams etc. vs. Albany City Ins. Co.	758
Walker vs. Maitland	328, 330, 583	Wilson vs. Dickinson	461
Walker vs. Robus	693, 829	Wilson vs. Lawrence	79, 125, 436
Walker vs. Transportation Co.	461	Wilson vs. Sandifer	818
Wall vs. Howard Ins. Co.	879	Windfield vs. Bacon	693, 829
Wall etc. vs. Home Ins. Co.	758	Windwart vs. Allen	528
Walsh vs. Hartford Fire Ins. Co.	477	Wing vs. Merchant	596
Walsh vs. Vt. Mut. Ins. Co.	92, 93, 571	Winneshiek Ins. Co. vs. Holzgraff	502
Walton vs. Coulson	660	Wistar vs. McManes	527
Walworth vs. Abel	841	Withers vs. Weaver	594
Ward vs. Johnson et al.	733	Wood on Insurance	92, 93, 111, 121, 190, 298, 493, 540, 569, 570, 571, 663, 738, 872.
Warnoch vs. Davis	431	Wood vs. Braddick	247
Washoe Tool Co. vs. Hibernia Ins. Co.	160	Wood vs. Poughkeepsie Ins. Co.	476
Waterman's Specific Perf. Cont.	734	Woodfin vs. Ashville etc. Co.	147
Waters vs. Merchants Louisville Ins. Co.	327, 330, 331, 581	Woodruff vs. Company	189
Waters vs. Monarch Ass's Co.	582, 583	Woods vs. Sawin	185
Watrous vs. Ins. Co.	758	Woody vs. Old Dominion Ins. Co.	500, 501
Watson vs. Dodd	192	Work vs. Leathers	333
Watson vs. Walker	556	Worsley vs. Wood	92
Weaver vs. Roth	841	Wynkoop vs. Ins. Co.	662, 664
Webster vs. Atkinson	185	Xenia Bank vs. Stewart	326
Well's Estate	594	York Co. vs. Central Rd.	580
Wells vs. Express Co.	245	Zabriskie vs. C., C. & C. B. R. Co.	733
Wentz vs. De Haven	594	Zetzer vs. Merkel	117
West Indies etc. Co. vs. Home etc. Ins. Co.	332	Zimmerman vs. Struper	28, 594
Westchester Fire Ins. Co. vs. Earle	672		

Int-206
 100
 41027

5
-
9
5

1
3
12
24
36
48
33
17
194

Standard Law Library



3 6105 06 151 098 3

